plainly sufficient to support the conviction.[8] See State v. Lane, above; Jackson v. Virginia, 443 U.S. 307 (1979).

(Continued from previous page)

primarily on the creation of foreseeable risk of great harm to humans, the igniting of "kindling" or lighter fluid for the purpose of engulfing a human body (or part of a human body) in flames might suffice – as long as the endangerment element is satisfied.

Nevertheless, as stated above, resolution of that question is not required here, because defendant did set fire to bedclothes by pouring lighter fluid and igniting it, and that act endangered the victim's life.

[8] The evidence was sufficient to support the conviction because of the jury's supported finding as to the commission of the offense of aggravated arson, and it is unnecessary to determine whether the evidence also established beyond a reasonable doubt that defendant was a principal to the offense of aggravated rape. Significantly, the jury found (in enumerating the aggravating circumstances after the penalty hearing) that defendant was engaged at the time of the killing in the commission of an aggravated arson (and not of an aggravated rape).

There was no error, however, in the trial judge's instructing the jury regarding the elements of aggravated rape. The evidence justified an instruction on the essential elements of the offense, and the jury was capable of drawing reasonable inferences from the evidence based on the trial court's instructions.

Finally, the prosecutor's [sic] mention in closing argument (without contemporaneous objection) that there were two rapes, one of which was proved by the fact that Lane was alone in the bathroom with the victim for 10 to 20 minutes, was certainly not sufficiently prejudicial to warrant a reversal of the conviction.

Additional Facts in Penalty Phase

At the sentencing hearing, both the state and defendant offered additional evidence.

Over defense objection, the state called a deputy prosecutor from Arkansas to present documentary evidence establishing the circumstances of defendant's prior indictment for second degree murder in the killing of a four-year old child and his eventual plea to involuntary manslaughter. The records also revealed that the trial court was presented with the facts of the incident before accepting defendant's plea of guilty to involuntary manslaughter and sentencing him to serve three years in prison.[9] Defendant was released on parole after one year and successfully completed his parole.

Defendant and his older sister both testified about defendant's unhappy childhood. Defendant's mother

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[9] According to the facts contained in the record, the young victim, who was the daughter of a woman with whom defendant was living, had been left in defendant's care while her mother went to work. Defendant brought the child to the emergency room of the hospital to be treated for injuries, which eventually resulted in her death. The medical evidence indicated that the child received a severe blow to the head. Further examination revealed bruises, scars and burn marks suggesting that the little girl had been the victim of earlier physical abuse.

The Arkansas prosecutor eventually accepted defendant's plea that the killing was committed "without malice" and without an intent to "produce death". See Section 41-2209, Arkansas Criminal Code. Defendant claimed that he was trying to discipline the child (who was allegedly "playing in her food") when the child's highchair fell over, causing her to hit her head on the concrete floor.

committed suicide shortly after the birth of defendant and a twin sister, when the older sister was only four years old. The circumstances forced the family to separate, and, according to defendant's sister, his father seemed to blame defendant for the family woes. He was extremely harsh and brutal with defendant.[10] As a child, defendant was faced with long hours of hard work on his father's Tennessee farm. He received few rewards or gratifications for his labors, either in terms of parental words or actions reflecting praise and affection, or in opportunities for traditional childhood activities.

Understandably, defendant began to run away at an early age. He was eventually institutionalized, but ran away from the state mental health facility. He lived with various relatives until he was about 17, when he left to begin a series of riverboat jobs.

Defendant also gave his version of the events leading to his prior conviction for involuntary manslaughter. In response to defendant's professions of accident and of love and affection for the child, the prosecutor cross-examined him about the cause of various injuries on the

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[10] One incident related by defendant's older sister described the frustration he faced as a child. His grandfather had given defendant a calf to raise. His father persuaded defendant to let him sell the calf to raise funds for the farming operation, agreeing to allow defendant to participate in a ball game in town. When the day of the eagerly awaited game arrived, the father refused to drive the boy to town, and defendant, then a preteen child, walked and hitchhiked the eight miles to the town. Upon his return, his father brutally beat him for acting contrary to his wishes.

child's body and about a statement he gave to police admitting that he had whipped the child.

Despite the evidence offered in mitigation, the jury recommended the death penalty, relying on three aggravating circumstances: (1) that defendant was engaged in the commission of aggravated arson, (2) that the offense was committed in an especially cruel, atrocious and heinous manner, and (3) that defendant had previously been convicted of an unrelated murder.

Review of Penalty Phase

Because the jury recommended the death penalty, this court must review the record to determine that the prosecutor and the trial court adhered to the procedural protections outlined by the Legislature and that the sentence is not excessive. See Gregg v. Georgia, 428 U.S. 153 (1976). In reviewing a death sentence, we are required by Supreme Court Rule 28 to consider:

> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Sufficiency of Evidence of Statutory Aggravating Circumstances

C.Cr.P. Art. 905.3 requires that the jury find beyond a reasonable doubt the existence of at least one of the statutory aggravating circumstances listed in C.Cr.P. Art. 905.4 before the jury can even consider recommendation of the death sentence. And Supreme Court Rule 28(b) requires that this court, on review for excessiveness, determine that the jury's finding was supported by the evidence.

The jury found the existence of three statutory aggravating circumstances. The evidence is clearly sufficient, as discussed earlier, to support the jury's finding with respect to the commission of an aggravated arson. The evidence also supports the jury's finding that the offense was committed in an especially cruel, atrocious and heinous manner.[11]

Defendant argues, however, that every aggravating circumstance found by the jury must be supported by the evidence and that the evidence does not support a finding that defendant was previously convicted of an unrelated murder. See State v. Monroe, 397 So.2d 1258

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[11] This court has construed this provision to include only those homicides in which the victim was subjected to "serious physical abuse . . . before death". State v. Sonnier, 402 So.2d 650, at 659 (La.1981). Thus, only in those cases in which the offender tortured or pitilessly inflicted unnecessary pain on the victim has this court held that this aggravating circumstance was supported by the evidence. See State v. Baldwin, 388 So.2d 664 (La.1980). See also State v. Culberth, 390 So.2d 847 (La.1980). The record in this case overwhelmingly supports such a finding.

(La.1981). The last portion of defendant's argument is correct, in that a finding of a conviction for an unrelated murder is not supported by a record which reflects only a conviction for involuntary manslaughter. State v. Culberth, 390 So.2d 847 (La.1980). However, C.Cr.P. Art. 905.3 only requires that the jury find the existence of one aggravating circumstance in order to consider recommending a sentence of death.

This court has upheld death sentences when only one of several aggravating circumstances found by the jury was supported by the evidence (as long as defendant was not unduly prejudiced by failure to comply with procedural safeguards or by the influence of arbitrary factors during the penalty phase, and as long as the death sentence was not otherwise excessive). State v. Martin, 376 So.2d 300 (La.1979). cert. denied, 449 U.S. 998; State v. Monroe, above.[12] The adequately supported finding of

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[12] At the time of this offense (although not at the time of the crime in the *Martin* and *Monroe* decisions), R.S. 14:30 required, as an essential element of first degree murder, the existence of at least one of four enumerated aggravating circumstances, which were also among the statutory aggravating circumstances listed in C.Cr.P. Art. 905.4. Therefore, under the present law the class of murderers for which the death penalty is potentially available has already been narrowed by the additional elements now necessary for a conviction of first degree murder, and a supported verdict of guilty of first degree murder in the guilt phase of the trial automatically fulfills the threshold requirement of a finding of at least one statutory aggravating circumstance, thereby authorizing the jury to consider imposing the death penalty. The penalty phase now serves primarily to afford an opportunity for the prosecution to offer proof of additional aggravating circumstances and for the defense to offer proof of mitigating circumstances.

the existence of one aggravating circumstance is alone sufficient to place defendant in that category of offenders properly exposed to the possibility of the death sentence.[13] See Williams v. Maggio, 679 F.2d 381 (5th Cir.1982) (en banc).

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[13] In Zant v. Stephens, ___ U.S. ___, 102 S.Ct. 1855 (1982), the United States Supreme Court (after the death sentence was reversed by a three-judge panel of the Fifth Circuit) remanded to the Supreme Court of Georgia for certification of the question of the state law premises that support the validity of the death sentence when one of the statutory aggravating circumstances found by the jury was constitutionally invalid. The present case, unlike *Stephens*, does not involve a facially unconstitutional aggravating circumstance. Moreover, C.Cr.P. Art. 905.3 is the state law basis in Louisiana for the jury's consideration of imposition of the death penalty when only one statutory aggravating circumstance found by the jury is supported by the evidence.

Finally, the use of statutory aggravating circumstances, which was approved in Gregg v. Georgia, above, as a method of channeling the jury's discretion in the determination of which first degree murderers are "death eligible", is particularly important in a capital sentencing scheme in which any intentional murder may be a capital offense. Unlike the Georgia statutory scheme (in which proof of a statutory aggravating circumstance in the penalty phase is a crucial consideration in the Jury's determination of which first degree murderers should be punished by death), Louisiana's present capital sentencing procedure requires (as noted in Footnote 12) the finding of an aggravating circumstance in the guilt phase of the trial, and the class of murders for which the death penalty will even be considered by a jury has already been significantly narrowed by the Legislature as a method of guiding sentencing discretion. Under the present law, many first degree murders in Georgia would be second degree murders in Louisiana.

Thus, under Louisiana's statutory scheme, the jury at the penalty trial must in effect make two separate but closely related findings in order to recommend a death sentence. The jury must first find the existence of *at least one* statutory aggravating circumstance as a threshold requirement before even considering imposition of the death penalty. If an aggravating circumstance is found, then the jury must take into account any mitigating circumstances and must make a separate finding regarding whether the death penalty should be imposed, *considering both the particular crime and the particular offender.* If the jury recommends the death penalty, this court must review *each* of the two separate jury findings.

Here, the supported finding of the commission of aggravated arson fulfilled the requirement of C.Cr.P. Art. 905.3 and the review requirement of Supreme Court Rule 28(b) regarding a supported finding of the existence of at least one aggravating circumstance. The [illegible] of a determination by this court that the evidence [illegible] not support the finding of an *additional* aggravating circumstance is a question which is more pertinent to the review of the jury's second finding – that is, the finding regarding the appropriateness of the death penalty for this particular crime and this particular murderer. We will address that question in the context of a discussion (in the next subsection) of whether evidence, which was offered in support of an unproved aggravating circumstance, introduced an arbitrary factor into the penalty phase which misdirected the jury's sentencing discretion.

Passion, Prejudice or other Arbitrary Factors

The evidence offered in support of the unproved aggravating circumstance in this case consisted of the official records of the Arkansas circuit court and prison pertaining to defendant's conviction of involuntary manslaughter. Defendant objected to this evidence on the basis (1) that the documents were hearsay and were not properly authenticated and (2) that evidence of the indictment for second degree murder was inadmissible because only evidence of the conviction was admissible.

A review of the record reflects that the documents were properly certified and were also authenticated by the testimony of the deputy prosecuting attorney. They were identified as properly certified copies of original documents, which were official records of the circuit court and of the Arkansas State Prison.[14] We therefore

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[14] As this court said in State v. Nicholas, 359 So.2d 965 (La.1978):

> "Generally, if an official writing is proved to come from the proper office where such documents are kept, the document will be authenticated as genuine by the certification of the custodian because of the presumption that he will carry out his duty to receive, record and certify only genuine official papers and reports." 359 So.2d at 969; see also 7 J. Wigmore, Treatise on Evidence §§ 2158-2159 (3d ed. revision 1940); McCormick, Law of Evidence § 224 (2d ed. 1972).

See also R.S. 15:457 and R.S. 15:529.1.

conclude that admission of the records was not barred by the lack of authenticity or by hearsay rules.[15]

Defendant's second ground for objection raises the question of what evidence is admissible in the penalty phase of the trial. C.Cr.P. Art. 905.2 declares that the hearing shall focus on the circumstances of the offense and propensities of the offender, but does not provide any specific rules regarding the admissibility of evidence at this unique type of hearing. At a sentencing hearing in a noncapital case (in which the judge will determine the sentence), many of the usual rules of evidence do not apply, because the postconviction focus on the appropriateness of sentence is vastly different from the preconviction focus on guilt or innocence. See Williams v. New York, 337 U.S. 241 (1949). which was cited in *Gregg* for the proposition that in "the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender". 428 U.S. at 187.

The instant case presents the question of whether evidence of a prior unrelated conviction of involuntary manslaughter (which clearly is relevant to a focus on the character and propensities of the offender) is admissible in the prosecution's case in chief, before the defendant

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[15] Compare State v. English, 367 So.2d 815 (La.1979), in which this court reversed a death sentence because the state failed properly to authenticate certain documents offered at the penalty trial.

takes the stand or otherwise puts his character at issue.[16] In Jurek v. Texas, 428 U.S. 262 (1976), the Court, although not specifically addressing the issue, approved a capital sentencing procedure in which any relevant evidence may be introduced in the penalty phase *after* the offender has been found guilty under a statute (similar to Louisiana's present statute) which defines first degree murder to require the finding of an enumerated aggravating circumstance as an essential element of the offense.[17] The Court did not discuss the scope of evidence admissible in the penalty phase, but relevance obviously cannot be the sole criteria for determining admissibility. It is logical

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[16] The usual prohibition against a jury's hearing evidence of other crimes, when such evidence tends merely to show a defendant's bad character, is not applicable in the penalty phase of a capital trial, because (unlike the guilt phase) the inquiry is designed to focus on defendant's character.

[17] In Jurek, the court noted:

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose. * * * So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option – even potentially – for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime."

that the offered proof should also conform to the other *applicable* rules of evidence and that procedural safeguards for fairness (such as notice) must be considered in determining admissibility.

We will not attempt in this decision to lay down detailed rules for admissibility of evidence in the penalty phase, but will address the issue only insofar as it is necessary to decide this case.

We hold that the evidence of the prior unrelated conviction of involuntary manslaughter was properly admitted, although the conviction did not qualify as an unrelated murder under C.Cr.P. Art. 905.4(c) and although defendant did not take any steps to place his character at issue. In the penalty phase of a capital case, the defendant's character *is* at issue and indeed is one of the principal issues.[18] In this particular case, the evidence

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[18] The prosecution arguably should be allowed to affirmatively negate the mitigating circumstances that defendant "has no significant prior history of criminal activity". C.Cr.P. Art. 905.5(a). If the prosecutor cannot introduce evidence of prior convictions in the case in chief during the penalty hearing, and the defendant introduces no character evidence, then the jury might be misled into believing that the existence of the mitigating circumstance has been proved by the absence of evidence.

Although the penalty hearing is to be conducted according to the *applicable* rules of evidence, the usual prohibition against the prosecution's initiation of the inquiry into defendant's character is simply not applicable in the penalty phase, where the focus on character is one of the statutory means of channeling the jury's sentencing discretion.

of the prior conviction not only was extremely relevant, but also was competent and highly reliable. Moreover, defendant was apparently prepared to meet the evidence and in fact did so with testimony rebutting or explaining the official record's factual statement which served as the basis for acceptance of the plea. We therefore conclude that the evidence of the conviction was properly admitted and did not constitute an arbitrary factor which improperly influenced the jury's sentencing discretion.

As to the evidence of an initial indictment for second degree murder (in the same incident), there was extensive testimony from both defendant and his sister concerning defendant's version of the incident. Even if the fact of an indictment for a greater offense (than the one to which defendant eventually pleaded) should have been excluded, the gravamen of the evidence was a presentation of the facts of the occurrence, and admission of the indictment was certainly not reversible error.

There is another factor in this case which we have considered, even though there was no contemporaneous objection, because of the possibility of prejudicial influence on the jury's recommendation of death. State v. Willie, 410 So.2d 1019 (La.1982). In the final closing argument, the district attorney alluded briefly to the possibility of pardon. In prior cases (decided after this trial), we have warned against such an argument, and we have ordered new penalty hearings in cases in which we concluded that the particular argument constituted an improper influence on the jury. See State v. Lindsey, 404 So.2d 466 (La.1981), and State v. Willie, above. We have never held, however, that an automatic reversal of the death penalty must follow the mere mention of the fact

that R.S. 14:30's prohibition against probation or parole for one under sentence of life imprisonment does not exclude executive pardon. Each case must be decided on its own facts and circumstances.

Here, the cryptic and brief comment came in response to the defense attorney's final plea to the jury to spare defendant's life and to sentence him to the "living death of life imprisonment", which implied that defendant could never be released.[19] Had the prosecutor done more than make a passing responsive comment on the possibility of a pardon, perhaps a reversal would be warranted. However, the prosecutor did not dwell on the speculative prospect of future action by the executive nor suggest to the jury that the speculative possibility of future release is a valid reason for recommending the death sentence. Thus, in the context of the entire argument, the prosecutor's responsive remark neither deflected the jury's attention from the ultimate significance and finality of the penalty recommendation nor

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[19] The only reference in closing argument to the possibility of pardon was:

> "The statute speaks without benefit of probation, suspension, commutation of sentence. The statute does speak about a pardon. The statute doesn't speak about a commutation so don't think that if you vote for first degree murder, I'm sorry, for life imprisonment that that will be the end of this matter as it related to Robert Sawyer because it's not."

misguided the jury's sentencing discretion by the introduction of inappropriate considerations.[20]

We also note that the prosecutor commented on Lane's conviction and sentence to life imprisonment. In response to defense counsel's beyond-the-record comment that Lane was sentenced to life (a fact not previously revealed to the jury) and to the suggestion that defendant should receive the same sentence, the prosecutor retorted by arguing (also beyond the record) that he had handled Lane's case and that there were aggravating circumstances present in defendant's case which were not present in Lane's case.

A strong admonition by the trial court, in which he instructed the jury not to consider the comments of either counsel regarding Lane's case, effectively prevented prejudice. The jury was clearly given the impression that defendant's case must be evaluated on its own merits, without regard to the sentence imposed on his original co-defendant.

Proportionality and Excessiveness of Sentence

Subsection (c) of Rule 28 requires this court to extend its review beyond the evidence submitted to the jury. We

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[20] Prosecutors tread on dangerous ground by mentioning the availability of pardon. Even though such a remark is accurate, it has little relevance to the penalty determination, except to give the jury a complete picture of the overall scheme for punishing first degree murderers (and perhaps to correct inaccurate defense statements or implications that a murderer under sentence of life imprisonment can never be released from prison).

must, in effect, decide whether the jury's recommendation of the death sentence was disproportionate, reviewing both the facts presented to the jury and the other materials submitted to us on review. We must consider the recommendations of juries in similar cases (from the judicial district), as well as the character of the defendant and the nature of his crime.

This is the sixth death sentence recommended by a jury in Jefferson Parish since 1976. It is only the third death sentence from that parish which we have upheld.[21] In one other case of a death sentence, we remanded for further evidentiary determinations.[22] In another, we remanded for a new penalty trial due to procedural flaws in the initial proceedings.[23] In one other case, the death penalty was set aside because of improper closing argument.[24]

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[21] In State v. Berry, 391 So.2d 406 (La.1980), we affirmed a recommended death sentence in a Jefferson Parish case in which the murderer intentionally killed a deputy sheriff during an aborted bank robbery. And in State v. Johnny Taylor, ___ So.2d ___ (La.1982) (No. 81-KA-2298), decided this day, we affirmed the death sentence in a case in which the murderer lured the victim from his home at night on the pretext of buying the victim's used automobile, stabbed the victim 20 times, and locked him alive in the trunk of the car, where he was left to die.

[22] See State v. Smith, 400 So.2d 587 (La.1981).

[23] See State v. Lindsey, 404 So.2d 466 (La.1981).

[24] State v. Jimmy Robinson, ___ So.2d ___ (La.1982) (No. 81-KA-1801).

As required by our rules, the district attorney has submitted information concerning all first degree murder prosecutions, including a brief description of the offense, the offender, and the disposition. A review of those cases illustrates the adage that no two cases are alike. (A brief description of each is included as part of an unpublished appendix.) In some, offenders, while engaged in robberies or burglaries, killed their victims or others who interrupted the commission of their crimes. In others, offenders killed out of anger at or hatred for the victim. In two cases, women were convicted for their part in schemes to kill their spouses.

The only thing which seems clear from a review of the cases presented to Jefferson Parish jurors is that they appear to recommend death in relatively few cases and only in those of an egregious nature. Certainly this case fits that description. Never before has this court been presented on appeal of a death sentence with such callous indifference to human suffering as was displayed here. After administering a savage beating, defendant sat comfortably listening to records, while his tormented victim lay dying before his eyes. Although defendant attempted to show that Lane was the principal aggressor, the jury obviously credited Ms. Shano's account which placed primary emphasis on defendant's role in Ms. Arwood's excruciatingly painful and lengthy ordeal. The jury obviously believed that he was principally responsible for urging Lane to participate in killing a woman who was virtually a perfect stranger to Lane.

Moreover, the superficial disparity between the sentences imposed on Lane and on defendant quickly disappears when one evaluates the culpability of the two men

in this incident, as well as their individual backgrounds. Neither of the two juries, which separately heard the cases and made the recommendations, acted unreasonably. Two participants in the same murder can easily be viewed very differently for penalty purposes.[25]

This murderer, a mature man of almost 30, was not under the domination of any other human being, nor did he play a minor role in the brutal slaying. Furthermore, unlike Lane, he had previously killed a helpless, weaker human being. His case is easily distinguishable from Lane's.

Defendant's only endeavor to present factors in mitigation was his presentation of his own version of the child's death and his heartrending account of a pitiful, deprived childhood. While the factors were properly considered by the jury and must be considered on appeal, they pale into insignificance when faced with the horrendous offense committed against a helpless young woman.

The value which society places on human life has led the Legislature to enact severe penalties for the unjustified killing of a human being. That same concern for the intrinsic worth of the life of the accused has also

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[25] See, for example, the cases involving the two Sonnier brothers, in which they kidnapped and murdered a young couple after raping the girl. This court eventually affirmed the death sentence for the older brother, who had a serious criminal record. See State v. Sonnier, 402 So.2d 650 (La.1981). However, this court concluded death was excessive for the younger brother, who acted under the influence and domination of his older brother and whose role in their crime was "relatively minor". See State v. Sonnier, 380 So.2d 1 (La.1979).

led courts and legislatures to erect carefully designed procedures which must be scrupulously followed before an accused's life may be taken by the state for his crime.

This court's function in reviewing a death penalty recommendation by a jury is not to sit as a subsequent sentencing panel, but to insure that the jury's recommendation was not influenced by arbitrary factors or improper considerations. The jury in this case was unanimously convinced beyond a reasonable doubt that defendant committed first degree murder and that the circumstances warranted the imposition of the maximum penalty which may be imposed. We are convinced, on review of the record, that the jury's recommendation was not reached arbitrarily and was not based on improper considerations, and we have been shown no basis for overturning that recommendation on appeal.

Accordingly, defendant's conviction and sentence are affirmed.

APPENDIX

(Not for Publication)

Cases in Which the Jury Recommended the Death Penalty

The following is a brief synopsis of the first degree murder convictions in which the jury recommended the death penalty.

In State v. Berry, 391 So.2d 406 (La. 1980), defendant was found guilty of first degree murder and sentenced to death upon a finding of three aggravating circumstances:

(1) defendant shot a peace officer who was engaged in his lawful duties at the time he was shot; (2) the murder was committed during an attempted armed robbery of a bank; and (3) the defendant created a risk of death or great bodily harm to more than one person. Defendant was 22 years old at the time of the offense, had a history of drug abuse, and a criminal record consisting of four arrests for nonviolent offenses and a conviction for simple burglary. He was on probation for the burglary charge at the time of the murder. The imposition of the death sentence was affirmed by this court.

In State v. Smith, 400 So.2d 587 (La. 1981), defendant was sentenced to death upon the finding of the single aggravating circumstance that defendant created a risk of death or great bodily injury to more than one person by randomly shooting at a group of boys. Defendant was 16 years old at the time of the offense and had no prior convictions, although he did have a juvenile record. This court remanded the case to the trial court for development of additional facts regarding the existence of the aggravating circumstances.

In State v. Lindsey, 404 So.2d 466 (La. 1981), the defendant was convicted of first degree murder under circumstances suggesting an armed robbery. The death sentence was imposed after the jury found the single aggravating circumstance that defendant created a risk of death or great bodily harm to more than one person. At the time of the offense, defendant was 20 years old with prior convictions for simple burglary and battery. This court reversed the death sentence because of explicit references by the prosecutor and the trial judge to the possibility of a pardon or commutation.

In State v. Taylor, No. 81-KA-2298, defendant was sentenced to death upon the finding of two aggravating circumstances: that the defendant was engaged in the perpetration or attempted perpetration of armed robbery at the time of the murder; and, that the offense was committed in an especially heinous, atrocious, or cruel manner. At the time of the offense, defendant was 28 years old with a prior grand larceny conviction. Defendant stabbed the victim approximately 20 times and placed him in the trunk of a vehicle. The victim bled to death.

Cases in Which the Jury Did Not Recommend the Death Penalty

The following is a brief synopsis of the first degree murder prosecutions resulting in the imposition of a life sentence.

In State v. Love, 410 So.2d 1045 (La. 1982), the defendant shot the victim in the head under circumstances suggesting an armed robbery. The jury recommended life imprisonment.

In State v. Riggins, 388 So.2d 1164 (La.1980), the defendant shot the victim, a 68 year old shopkeeper, four times under circumstances suggesting an armed robbery. The jury recommended life imprisonment.

In State v. Andrews, 369 So.2d 1049 (La. 1979), defendant stabbed the victim to death during a heated argument. The two were competitors in a sandlot football game. The jury recommended life imprisonment.

In State v. Manieri, 378 So.2d 931 (La. 1979), defendant strangled and stabbed the victim, an 11-year old boy, 30 times. The jury recommended life imprisonment.

In State v. Moses and Wilson, 404 So.2d 968 (La. 1981), the two defendants were convicted of first degree murder and sentenced to life imprisonment. The two black defendants fired on a crowd of white males, fatally injuring one of the members of the group. The defendants claimed self-defense. This court reversed and remanded the case based on racial comments made by the prosecutor during closing argument.

In State v. Sharp, ___ So.2d ___ (La.1982), (No. 81-KA-2385), defendant was convicted of two counts of first degree murder and sentenced to life imprisonment. Defendant brutally stabbed his brother-in-law and sister-in-law to death following an argument in their home. The victims bled to death in the presence of their teenage son while waiting for emergency units.

In State v. Shilling, ___ So.2d ___ (La.1982), (No. 82-KA-1820), defendant was convicted of the first degree murder of James Stache. A co-defendant, Billiot, was convicted of second degree murder. The victim had been drinking with the defendant and a co-defendant in a local bar. The men left the bar, accompanied by three females, and Billiot drove to a deserted area. The two defendants and the victim left the car and the defendants started beating the victim. They then began stabbing the victim with their knives, bashing his head against the car, and kicking him. Defendants took the money from the victim's pants and left him for dead. Defendants returned to the scene to look for Shilling's knife and found the

injured victim attempting to hitchhike a ride for help. The defendants forced the victim in the car and drove to a nearby drainage ditch. They then took the victim out of the car, punched him in the throat and Shilling used his knife to slash the victim's throat. Shilling then put the victim's head underwater and joked about the manner in which bubbles were created on the surface.

In State v. Tuckson, 414 So.2d 360 (La.1982), defendant was convicted of first degree murder and sentenced to life imprisonment. The victim observed defendant burglarizing his trunk and attempted to stop him. Defendant fired a gun at the victim and the victim died from a gunshot wound to the heart.

In State v. Goza, ___ So.2d ___ (La.1982) (No. 81-KA-1699), defendant was convicted of first degree murder and sentenced to life imprisonment. Defendant procured someone to kill her husband. She was with her husband when he was shot on Jefferson Highway. Defendant informed the police that a white male wearing a "Groucho Marx" mask had killed her husband while burglarizing their business.

In State v. Dupiere, presently pending on appeal before this court, defendant was convicted of second degree murder and sentenced to life imprisonment. Defendant and a co-defendant, Mangerchine, conspired to commit an armed robbery. The defendants drove to the Model Motel on Jefferson Highway. Defendant Dupiere left the car and went inside. Dupiere ran out of the motel, jumped into the car and informed Mangerchine that he had to shoot the manager. Mangerchine was granted

leniency in exchange for his testimony and received 21 years at hard labor for manslaughter.

In State v. Smith, presently pending on appeal before this court, defendant was convicted of second degree murder and sentenced to life imprisonment. Defendant burglarized the victim's neighbor's home and shot and killed the victim when the victim attempted to apprehend him.

In State v. Parks, (No. 82-KA-0074), defendant was convicted of second degree murder and sentenced to life imprisonment. Defendant and her boyfriend agreed to split the proceeds of any insurance policy on her husband. The boyfriend executed the husband, robbed him of his paychecks and gave the checks to defendant. Defendant cashed the checks the next day.

SUPREME COURT OF LOUISIANA

No. 81-KA-1566

STATE OF LOUISIANA

Versus

ROBERT SAWYER

DIXON, Chief Justice (concurring)

I respectfully concur.

C.Cr.P. 905.2 is ambiguous. We should not interpret it to permit the introduction of "character and propensit[y]" evidence except "according to the rules of evidence." C.Cr.P. 905.2. Here, however, the error of

permitting evidence of bad character before character is placed at issue by defendant was harmless beyond reasonable doubt.

SUPREME COURT OF LOUISIANA

NO. 81-KA-1566

STATE OF LOUISIANA

versus

ROBERT SAWYER

DENNIS, Justice, concurring in the result.

I concur in the result but strenuously disagree with the majority's unabashed disregard of the law and rules of evidence governing capital sentence hearings.

Code of Criminal Procedure article 905.2 clearly provides that "[t]he hearing shall be conducted according to the rules of evidence" and that "[e]vidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue." This plainly indicates that, except for evidence relative to aggravating and mitigating circumstances, the introduction of character evidence is governed by the rules of evidence, including the statutory rules set forth by R.S. 15:479-83. Of these, R.S. 15:481 and 483 are most pertinent here: § 481 "The state is permitted to introduce testimony of the bad character of the accused only in rebuttal of the evidence introduced by him to show good character." § 483 "No other investigation into the character of a witness is permissible except such as affects his

credibility." These rules plainly state that a defendant's character cannot be attacked until he puts it at issue by the introduction of good character evidence or by taking the witness stand. Our law contains also a great many jurisprudential rules, not the least important of which are the rules adopted by this court in State v. Prieur 227 So.2d 126 (La. 1973), to guarantee due process of law and relevance in the introduction of other crimes evidence.

The majority is completely wrong in stating that art. 905.2 does not provide any specific rules regarding the admissibility of evidence at a capital sentence hearing. Art. 905.2 clearly states that the hearing shall be conducted according to the "rules of evidence" which obviously include those laws previously enacted by the legislature and probably emcompass [sic] those rules previously adopted by this court. As any evidence scholar knows, the legislature has not yet enacted a comprehensive evidence code and our body of that law is inadequate and unworkable without the jurisprudentially developed rules.

In truth, the majority has ignored the sentencing procedure enacted by the legislature and is attempting to fashion a procedure more to its liking. Apparently, the majority prefers the procedure that was adopted by Texas as described by the Supreme Court in Jurek v. Texas 428 U.S. 262 (1976). In a Jurek sentence proceeding, the jury is nearly always asked to make a finding on only one question not already answered at the guilt trial. That is, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." See Black, Capital Punishment, the Inevitability of Caprice and Mistake 115 (2d ed.

1981). When this is the crucial question, perhaps a wide-open-no-holds-barred procedure, allowing any and all bad character evidence from the word go, is appropriate. But the Texas Jurek proceeding is quite different from the procedure established by Louisiana law under which the jury must find beyond a reasonable doubt that at least one statutory aggravating circumstance exists, and weigh against it any mitigating circumstances, before it may go on to unanimously recommend a sentence of death. Regardless of which procedure in our personal opinions is wiser, fairer, or more just, this court has no legitimate power to usurp the plenary will of the Legislature and reshape the statutory system according to its own specifications.

I find it quite disturbing also that the majority seeks to support its disregard of the law and rules of evidence by implying that there is no essential difference between a capital sentencing by a jury and a noncapital sentencing by a judge. Is the majority implying that this court considers the solemn protections with which the legislature earnestly has surrounded the imposition of our most severe penalty to be meaningless technicalities? That "many of the usual rules of evidence do not apply" even though the Legislature has said they must? If so, the majority's cavalier attitude toward the law enacted by the Legislature and the extremity and permanence of capital punishment is appalling.

The majority opinion is very unclear as to what "procedural safeguards . . . (such as notice)" will be required in penalty hearings. See p. 16. It is hoped that the majority intends to apply the Prieur guidelines to capital punishment proceedings. It would seem that in the

sentencing phase of a capital case most of all, a defendant is entitled to notice, fairness and due process and should not lose his life because of surprise or the lack of a fair opportunity to meet the evidence against him. Yet, the majority has said in footnote 16 that the "usual prohibition" against other crimes evidence is "not applicable in the penalty phase of a capital trial." Its reference on page 16 to the "*applicable* rules of evidence" is robbed of any meaning by the rest of the opinion which seems dedicated to doing away with rules of evidence in sentencing hearings.

In my opinion, the character of the defendant is not generally at issue ab initio in a capital sentencing hearing. Evidence relevant to an aggravating or mitigating circumstance is admissible throughout the proceeding. Unless it fits within this category, however, bad character evidence, including other crimes evidence, is admissible against the defendant only according to the rules of evidence. The opening sentence of C.Cr.P. art 905.2, which states that the sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender does not vitiate the meaning of the great number of detailed provisions which follow it. "Focus," when used as a verb means to concentrate or to converge. The introductory statement that the hearing shall concentrate on the defendant's character among other matters is not equivalent to saying that all character evidence shall be admissible. The remaining provisions of Art. 905.2 et seq. tell exactly how the hearing shall focus or concentrate on its subjects, and basically that is by

following the rules of evidence, except that the introduction of all evidence relevant to aggravating or mitigating circumstances is permitted.

Additionally, I do not consider myself bound by any of the footnotes in the majority opinion. *Footnotes numbers 12* and *13* particularly appear to be entirely unnecessary and seem to reach out to decide issues not before us. The statement that the finding of guilt "automatically" constitutes a finding of an aggravating circumstance in the penalty hearing is contrary to law. The jury must independently find at least one aggravating circumstance *during the sentence hearing* before it may consider the death penalty. C.Cr.P. art 905.3. The elliptic statements regarding Zant v. Stephens, 102 S.Ct. 1855 (1982), and its possible relationship to our law are unclear, unwise, and unnecessary. *Footnote Number 16* is an outright perversion of the law. It flatly states that the prohibition against other crimes evidence is not applicable in a penalty phase. Again, C.Cr.P. art. 905.2 clearly indicates to the contrary. It says that evidence relative to aggravating and mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue, which clearly indicates that outside this exception, the state cannot introduce such evidence until the defendant places his character or credibility at issue "according to the rules of evidence." *Id.*

Nonetheless, I concur in the result. I agree with the Chief Justice that the errors in introducing the bad character evidence were harmless beyond a reasonable doubt. I also concur only in the result for the additional reasons that I find the conviction of guilt to be supportable on a different basis than the majority and consider that

another error in the penalty phase was also harmless error.

The first degree murder conviction is justified by the evidence which in my opinion proves that the defendant was a principal to the perpetration of aggravated rape during the criminal transaction.

The death penalty is warranted because the offense was committed in an especially heinous, atrocious, or cruel manner. Although I am uncertain that the evidence supports a finding that the offender was engaged in the perpetration of aggravated arson, and I am troubled by the jury's failure to find the perpetration or attempted perpetration of aggravated rape as an aggravating circumstance, I ultimately conclude that any error committed by the jury during the penalty hearing was harmless. This crime was so horrible and involved such pitiless and needless torture of the victim that I am convinced beyond a reasonable doubt that the jury would have recommended the death penalty even if it had been informed that the evidence was insufficient to justify findings that the offender was engaged in the perpetration of aggravated arson or had previously been convicted of an unrelated murder.

I agree with the majority's statement at p. 22 of its opinion that this court does not sit as a subsequent sentencing panel. But a word of caution is necessary. By this, we do not mean that we have abandoned our consitutional [sic] function of reviewing death sentences to see if they constitute cruel, unusual or excessive punishment under the circumstances of the case. What is meant is that

we do not formulate or impose sentences; we either affirm them or reverse them.

* * *

STATE of Louisiana

v.

Robert SAWYER.

No. 81-KA-1566

Supreme Court of Louisiana.

Feb. 10, 1983

In re: Robert Sawyer, applying for Stay of Execution, Parish of Jefferson, No. 79-2841.

ORDER

The foregoing motion considered:

IT IS ORDERED that Execution of Robert Sawyer by the State of Louisiana, the Department of Corrections, and any other Department, agent or servant of the State of Louisiana, presently set for March 8, 1983, be and the same is hereby stayed pending the timely filing and disposition of a petition for a writ of certiorari.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

July 6, 1983

Mr. William C. Credo III
District Attorney
Courthouse Annex, 5th Floor
Gretna, LA 70053

Re: Robert Sawyer,
v. Louisiana
No. 82-6263

Dear Mr. Credo:

The Court today entered the following order in the above entitled case:

The motion for Leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Louisiana for further consideration in light of Zant v. Stephens, 462 U.S. ___ (1983).

Very truly yours,

Alexander L. Stevas, Clerk
/s/ Alexander L. Stevas

NOV 28 1983

SUPREME COURT OF LOUISIANA

NO. 81-KA-1566

ROBERT SAWYER

versus

STATE OF LOUISIANA

On Remand from the
United States Supreme Court

BLANCHE, Justice

Defendant was convicted of first degree murder and subsequently sentenced to death. The conviction and sentence were affirmed in State v. Sawyer, 422 So.2d 95 (La. 1982). Defendant applied for a writ of certiorari to the United States Supreme Court, on the ground that evidence of another crime not considered a statutory aggravating circumstance was admitted at the sentencing, thereby injecting an arbitrary factor into the jury's decision making process. The Supreme Court remanded the case to this court for consideration in light of the holding in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983).

FACTS

The gruesome and depraved facts surrounding this case were given a thorough treatment in the court's previous opinion. See Sawyer, 422 So.2d 95 (La. 1983). Therefore, we give only a brief recitation of the circumstances leading to defendant's conviction. On September 29, 1979, Fran Arwood was at the residence of Defendant, where

she was helping to care for the young children of defendant's live-in girlfriend. Defendant and a friend, Charles Lane, attacked Ms. Arwood, striking her repeatedly in the face. Thereafter, the two men proceeded to torture the victim by first dunking her body into scalding water, then beating her and ultimately setting fire to the victim's genitalia with lighter fluid. The testimony of Ms. Shano at trial also indicated that, at some stage the victim was raped. After this savage attack, defendant and Lane left the mortally wounded victim on the floor of the house until relatives of Ms. Shano arrived later in the day.

Both defendant and Lane were indicted for first degree murder. Lane was tried separately and sentenced to life imprisonment. State v. Lane, 414 So.2d 1223 (La. 1982). Defendant was convicted by a unanimous jury, which then proceeded to sentence defendant to death.

At the sentencing hearing, the State reoffered evidence presented in its case in chief to establish that defendant had murdered the victim while in the perpetration of aggravated arson and aggravated rape, and that defendant had murdered the victim in an unusually cruel manner. Additionally, the State called a deputy prosecutor from Arkansas, who introduced documentary evidence that defendant had pled guilty to involuntary manslaughter of a four-year old child, and had served one year in prison as a result. Afterwards, defendant testified about the guilty plea and his version of the event leading to the child's death. Both defendant and his sister offered mitigating testimony as to defendant's brutal childhood and one time institutionalization at a state mental health facility.

Upon hearing all the evidence, the jury announced its finding of three statutory aggravating circumstances: (1) that defendant was engaged in the perpetration of aggravated arson; (2) that the offense was committed in an especially heinous, atrocious and cruel manner; (3) that defendant was previously convicted of an unrelated murder and sentenced defendant to death. On appeal, this court found that the last aggravating circumstance was not supported by the evidence, 422 So.2d at 101, but correctly observed that only one aggravating circumstance need be found in order to place defendant in the category of offenders capable of receiving the death penalty. Defendant, however, argued that introduction of testimony relating to the manslaughter plea was improper, since it was neither admissible as an aggravating circumstance in the guilt phase of the trial, nor as other crimes evidence in the sentencing phase where defendant had not previously placed his character at issue. In upholding the admission of the testimony, this court found that Louisiana C.Cr.P. art. 905.2 allowed the evidence to be considered to show defendant's bad character, reasoning that defendant's character is put at issue by the nature of the proceeding, regardless of whether he takes the witness stand on his own behalf and places his character at issue.

ISSUE

On remand, we are asked to consider our previous holding in light of Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983). In that case, the U.S. Supreme Court affirmed

the constitutionality of a Georgia sentencing statute, finding that the invalidity of several aggravating circumstances found by the jury did not impair the death sentence in the case. Based upon our reading of Zant, we frame the following issues for resolution: (1) Under the Louisiana statutory scheme, does the finding of an additional aggravating circumstance that is later found invalid have any affect [sic] on the jury's sentence determination, where evidence of the invalid circumstance was otherwise admissible? (2) Was evidence of the invalid aggravating circumstance admissible in the instant case to show defendant's character, where defendant had not first placed his character at issue? (3) If inadmissible, was the evidence so consequential that it injected an arbitrary factor in the jury's decision to sentence defendant to death?

THE STATUTORY SCHEME

Louisiana's capital sentencing procedure. La. C.Cr.P. art. 905-905.9, is similar in many respects to the Georgia procedure examined in Zant.[1] As in Georgia, the trial of

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[1] The Georgia sentencing procedure was explained in detail by the Georgia Supreme Court in response to the U.S. Supreme Court's certified question in Zant, 250 Ga. 97, 297 S.E.2d 1 (1982). Essentially, the Georgia System is divided into three planes:

I. Ga. Code Ann. §26-1101 separates those homicide cases which fall into the category of murder. This is an issue of fact determined during the guilt phase of the trial.

(Continued on following page)

an individual charged with first degree murder is bifurcated; consisting of a guilt phase and a penalty phase. During the guilt phase of the trial, the jury must make the initial determination whether the defendant belongs in the class of offenders who *may* be exposed to the death penalty. La. R.S. 14:30 provides that in addition to specific intent to kill a human being, the offense must include one of four aggravating circumstances.[2] Once the defendant has been found guilty, the jury must then determine whether defendant will be given the death sentence.

(Continued from previous page)

II. Ga. Code Ann. §27-2534.1 provides that unless at least one aggravating circumstance is found, the death penalty may not be imposed in a given murder case.

III. Once it is determined that the death penalty may be imposed, the fact finder determines whether it shall be imposed. This determination takes into account all relevant evidence in mitigation or aggravation, and vests absolute discretion on the fact finder.

Superimposed on this scheme is the automatic appeal to the Georgia Supreme Court, who determines whether the penalty was imposed under the influence of passion, prejudice or other arbitrary factors.

[2] La. R.S. 14:30 states:

First degree murder is the killing of a human being:

(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration of attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

(Continued on following page)

The process of sentencing is explained in Code of Criminal Procedure Art. 905.3, which states:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that *at least one statutory aggravating circumstance exists*, and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.

Clearly, then, the sentencing phase is itself broken down into two aspects. Initially, the jury must find the existence of at least one statutory aggravating circumstances before an offender can be sentenced to death. Because the aggravating circumstances listed in Article 905.4 include most of the aggravating circumstances listed in R.S. 14:30, the jury will usually have already found at least one aggravating circumstance before it reaches the penalty phase of the trial. Louisiana's scheme differs from Georgis's [sic] in this respect, for the class of offenders in Louisiana

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(Continued from previous page)

> (2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;
>
> (3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
>
> (4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

eligible for the death penalty is considerably narrower after the guilt phase of the trial.[3]

Once a *single* aggravating circumstance is found, the jury may then consider all the evidence, both in aggravation and mitigation, in order to make the final determination that the offender should be put to death. The finding of additional aggravating circumstances are therefore unnecessary to advance the case to consideration of whether the death penalty will in fact be imposed. Nothing in the statutory scheme requires that the jury weigh two or more aggravating circumstances more heavily

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[3] Under Ga. Code Ann., murder punishable by death is defined in the following manner:

> §26-1101 Murder
>
> (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of a human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
>
> (b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

Clearly, then what is considered second degree murder in Louisiana would be considered murder in Georgia, subject to the death penalty.

against the defendant than a single aggravating circumstance. Rather, the finding of *statutory* aggravating circumstances is simply a preliminary step before any balancing process can be undertaken.[4]

ADMISSIBILITY OF THE EVIDENCE

While the failure of an aggravating circumstance may not of itself impair the sentence, the introduction of otherwise inadmissible evidence in support of the circumstance could inject an arbitrary factor in the sentencing process. Defendant maintains in the instant case that inadmissible evidence was put before the jury in the form of testimony of the involuntary manslaughter conviction.

Defendant's argument is based on the language of C.Cr.P. art. 905.2, which addresses the conduction of sentencing hearings. The article provides:

> The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. *The hearing*

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[4] Additional protection is afforded defendant by Rule 28 of the Louisiana Supreme Court, which provides for automatic review by this court to determine if the sentence is excessive. Included in this review are inquiries into whether:

(1) the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors; and

(2) whether the evidence supports the jury's finding of a statutory aggravating circumstance; and

(3) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant

> *shall be conducted according to the rules of evidence.* Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Defendant contends that the second sentence of 905.2 precludes the introduction of other crimes evidence unless offered to show defendant's bad character, or to support a valid aggravating circumstance.[5] 905.4(c) limits

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[5] Article 905.4 provides that:

> The following shall be considered aggravating circumstances:
>
> (a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;
>
> (b) the victim was a fireman or peace officer engaged in his lawful duties;
>
> (c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;
>
> (d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(Continued on following page)

other crimes which may be considered aggravating circumstances to convictions of unrelated murders, aggravated rape, or aggravated kidnapping, or where the offender has a significant prior history of criminal activity. It does not include guilty pleas, or for that matter, convictions of involuntary manslaughter.[6] Accordingly, defendant argues that he has not placed his character at issue by taking the stand, evidence of the guilty plea

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(Continued from previous page)

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

(h) the victim was a witnesses [sic] in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

[6] See State v. Antonio James, ___ So.2d ___ (La. 1983) (Blanche, J., concurring in part and dissenting in part).

cannot be introduced. As further support for this proposition, defendant points to the following sentence of 905.2 – which allows for other crimes evidence to be introduced regardless of whether defendant has taken the stand if it relates to the aggravating circumstances – as a limited exception to the general rules of evidence by which the hearing should be guided.

This argument was espoused by defendant when the case was originally before this court, State v. Sawyer, 422 So.2d 95 (La. 1982). We rejected the argument then, and most recently, in the case of State v. Jordan, ___ So.2d ___ (La. 1983).[7] Now, after having been asked to reconsider the question, we affirm our prior holdings.

The first sentence of 905.2, which defendant ignores in his effort to expand the meaning of the second sentence, expresses the true intent of the statutory scheme. When it commands that the sentencing hearing focus on the "circumstances of the offense and the *character*[8] and propensities of the offender," 905.2 makes it clear that the character of the defndant [sic] is one of the two most relevant factors with which the sentencing hearing should be concerned. As we observed in State V. Matheson:

> The above article clearly provides that the focus of the sentencing hearing is on "the character and propensities of the offender" as well as the

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[7] The opinion was authored by Judge Julian Bailes, sitting for Justice Marcus.

[8] Emphasis added.

> circumstances of the offense and that evidence of "aggravating or mitigating circumstances" are relevant *irrespective* of whether defendant places his character at issue.

407 So.2d 1150, 1164 (La. 1981) In State v. Jordan, we stated that "it is axiomatic that the conviction per se puts the convicted offender's character at issue" ___ So.2d ___, ___ (La. 1983). At the heart of such a statement rests the underlying difference between the uses of character evidence at the guilt and sentencing phases of a trial. The rules of evidence prohibit the use of character evidence where defendant has not placed his character at issue for the simple reason that such evidence is not relevant to the issue of guilt. To the contrary, in a sentencing hearing, the jury is asked to scrutinize defendant's character, to ascertain whether the offender and the offense fit the statutory scheme for those whom the death penalty has been designed.

We are of the opinion that the reference to the rules of evidence contained in Article 905.2 was placed there to regulate the introduction of competent versus incompetent evidence, and should not be construed to prohibit introduction of highly relevant character evidence at the sentencing hearing.[9] Thus, we conclude that the evidence

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[9] In a concurring opinion to Jordan, J. Lemmon noted the absurd result of applying the other crimes rule to a sentencing hearing:

> "It is therefore highly doubtful that the Legislature intended for the defendant to control the

(Continued on following page)

of defendant's guilty plea to involuntary manslaughter of a four-year old child was properly admitted to show defendant's character.

ARBITRARINESS

Although we find that the evidence was admissible under Article 905.2, and thus injected no arbitrary factor into the decision process of the jury, we think that even if the evidence had been inadmissible, no serious prejudice could have resulted to defendant. Defendant has argued strenuously in his brief that the prosecutor relied heavily on the details surrounding defendant's guilty plea to manslaughter to convince the jury to return a death sentence. Regardless of whatever emphasis the prosecutor placed on the guilty plea, it is inconceivable, given the overwhelming evidence of the heinous nature of the principal offense already before the jury, that the additional evidence of the manslaughter plea could have seriously prejudiced defendant at that point.

DECREE

For the reasons assigned, we find that the failure of one of three statutory aggravating circumstances did not create an arbitrary factor in the sentencing of defendant

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(Continued from previous page)

> decision on which evidence of his character and propensities will be introduced at the penalty hearing. Yet this is exactly what the adoption of defendant's argument would permit." State v. Jordan, ___ So.2d ___, at ___ (La. 1983) (Lemmon, J., concurring).

by allowing inadmissible evidence to be considered by the jury. Therefore, the sentence of defendant is affirmed.

AFFIRMED

SUPREME COURT OF THE UNITED STATES

No. 83-6258

Robert Sawyer,

Petitioner

v.

Louisiana

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Louisiana, No. 81-KA-1566.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Supreme Court of Louisiana.

IT IS ORDERED by this Court that the said petition be, and the same if hereby, denied.

A true copy ALEXANDER L. STEVAS
Test:
Clerk of the Supreme Court of the United States
By Illegible
Chief Deputy

April 2, 1984

Justice Brenran and Justice Marshall dissenting: Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

STATE OF LOUISIANA,
PARISH OF JEFFERSON

24th Judicial District Court

State of Louisiana	No. 79-2841
VS.	Division G
ROBERT SAWYER	Date 5-8-84

DISTRICT ATTORNEY _____ JUDGE TIEMANN

PETITION FOR WRIT OF HABEAS CORPUS IN ACCORDANCE WITH LOUISIANA SUPREME COURT RULE XXVII WAS FILED IN OPEN COURT. HAVING EXAMINED THE FOREGOING PETITION FOR POST-CONVICTION RELIEF, WRIT OF HABEAS CORPUS, EVIDENTIARY HEARING AND STAY OF EXECUTION, THE COURT DENIED THE PETITION AND STAY OF EXECUTION.

/s/ Kathy Wright
DEPUTY CLERK

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA
EX REL ROBERT SAWYER

VS

ROSS MAGGIO, JR.,
WARDEN LOUISIANA STATE
PENITIENTIARY (sic)

NUMBER
84-KP-0919

In Re: ROBERT SAWYER, applying for Writ of Review and Stay of Execution to the Twenty-Fourth Judicial District Court, Parish of Jefferson, Number 79-2841, Division G.

May 10, 1984

In view of the fact that counsel assigned by the trial judge in this capital case was not admitted to the bar for at least five years prior to trial as required by La. Code Crim. P. art. 512 and considering defendant's contentions relative to ineffective assistance of counsel, we grant the application, stay the execution and remand the case to the district court with instructions to the trial judge to conduct an evidentiary hearing on whether defendant received effective assistance of counsel and to reconsider defendant's entire application in light of that evidence.

/s/ WFM
/s/ JAD
/s/ PFC
/s/ JLD

/s/ FAB

/s/ JCW

/s/ HTL

Supreme Court of Louisiana
May 10, 1984

/s/ Illegible
Clerk of Court
For the Court

STATE OF LOUISIANA	24TH JUDICIAL DISTRICT COURT STATE OF LOUISIANA PARISH OF JEFFERSON
VERSUS	NO. 79-2841,
ROBERT SAWYER	DIVISION "G"

FILED: _____, 1985

_____
DEPUTY CLERK

JUDGMENT

Petitioner's post-conviction Application for Habeas Corpus came for hearing on the 25th day of July, 1984, and by agreement of counsel, was submitted on the record, affidavits, stipulation and memoranda of law.

PRESENT: Elizabeth W. Cole and
Catherine Hancock
Attorneys for petitioner,
Robert W. Sawyer;

William C. Credo, III,
Assistant District Attorney
for Respondents, Ross Maggio,
et als.

IT IS ORDERED, ADJUDGED AND DECREED, that Petitioner's Writ of Habeas Corpus be, and is hereby DENIED.

JUDGMENT READ, RENDERED AND SIGNED in Open Court this 8th day of February, 1985.

/s/ M. Joseph Tiemann
M. JOSEPH TIEMANN,
JUDGE, DIV. "G"

STATE OF LOUISIANA	*	24TH JUDICIAL DISTRICT COURT STATE OF LOUISIANA PARISH OF JEFFERSON NO. 79-2841, DIVISION "G"
VERSUS	*	
ROBERT SAWYER	*	

FILED: _____, 1985

_____
DEPUTY CLERK

REASONS FOR JUDGMENT

This matter came for hearing pursuant to a remand from the Louisiana Supreme Court to determine the effect of a violation of C.Cr.P. Art. 512, the claims of ineffective assistance of counsel, and the defendant's (petitioner's) entire application for Writ of Habeas Corpus. Of the twenty (20) claims asserted by petitioner, the Court finds that several of these claims are overlapping, and therefore, will address them by substantive issue presented therein.

Claim 1

DENIAL OF DUE PROCESS AND EQUAL PROTECTION CONSTITUTIONAL RIGHTS BY APPOINTED COUNSEL WHO HAD BEEN ADMITTED TO THE BAR FOR LESS THAN FIVE (5) YEARS (*C.Cr.P. Article 512*)

The record reflects that Robert W. Sawyer, petitioner herein, was indicted for First-Degree Murder on December 7, 1979, and was arraigned on January 24, 1980. At the arraignment, the Honorable Charles Gaudin appointed Wiley Beevers to represent Sawyer, who entered a plea of not guilty. Mr. Beevers had, at the time of the arraignment, more than five (5) years experience at the bar. James Weidner was also appointed by the Court to assist Mr. Beevers. It has been stipulated that Mr. Weidner did not have five (5) years experience at bar at the time of his appointment. Mr. Beevers later withdrew, and Mr. Weidner was reappointed on March 27, 1980, as sole counsel of record. Prior to trial, Mr. Weidner engaged the services of Sam Stephens, an attorney who was two (2) weeks short of the five (5) years requirement contained in C.Cr.P. Art. 512, which states:

> *When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of R.S. 15:145. Such counsel must be assigned before the defendant pleas to the indictment, but may be assigned earlier. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned an assistant counsel.*

Sawyer was convicted of First-Degree Murder by a jury of twelve (12) on September 19, 1980. On that same

day, the jury recommended the death penalty. For a recitation of the facts, see *State v. Sawyer*, 422 So.2d 95 (La. 1982).

The issue before this Court is whether or not Sawyer's conviction should be reversed based on the technical violation of C.Cr.P. Art. 512. Irrespective of petitioner's contention that the mere violation of this article constitutes a denial of due process and equal protection of the laws, and therefore should require a reversal, this Court is of the opinion that the legislative intent of Article 512 was to insure *effective assistance* of counsel to a defendant charged with a capital offense. Article 512 was designed, in this Court's opinion, as a safeguard against inexperienced counsel representing a defendant charged with such a serious offense. A violation of Article 512 could be viewed as a rebuttable presumption that the indigent defendant was not provided with effective assistance of counsel. However, this presumption could be rebutted upon a showing that appointed counsel rendered effective assistance. The purpose of Article 512 would, therefore, be met when such a defendant, *in fact*, is represented by experienced counsel even though that attorney has slightly less than the requisite five (5) years admission to the bar. In this Court's opinion, the legislature suggested that competence occurs with five (5) years admission. Where competence is shown to exist, suggestion must give way to reality. In the instant case, the technical mandate of Article 512 was fulfilled when Wiley Beevers, an attorney who at the time of the time of [sic] arraignment had considerably more than five (5) years admission to the bar, was appointed as chief counsel to represent Sawyer. In accordance with said Article, James

Weidner was appointed by the Court to assist Mr. Beevers. Thus, the genuine issue in this case is whether or not Mr. Weidner actually rendered effective assistance of counsel to Robert Sawyer. This issue will be more fully discussed under petitioner's Claim II. However, pretermitting this issue, respondents allege that the technical violation of Article 512 is, at most, harmless error. According to La. C.Cr.P. Article 912, *"a judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused."* The burden of proving harmless error rests upon someone other than the person prejudiced by it to show that it was harmless. See *State v. Gibson*, 391 So.2d 421 (La. 1980). Thus, respondents herein must prove that the trial court's failure to appoint counsel with five (5) years admission to the bar created little likelihood that such an error would have changed the results reached by the jury. See *State v. Ferdinand*, 441 So. 2d 1272 (La. App. 1 Cir., 1983), writ denied 445 So.2d 1233. Additionally, the United States Supreme Court held in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967) that some consitutional [sic] errors may be considered harmless if the beneficiary of the error *"prove(s) beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id.*, 386 U.S. 24, 87 S.Ct. 828. After reviewing seven (7) volumes of transcripts and the record, this Court is of the opinion that the error complained of did not constitute a substantial violation of petitioner's constitutional or statutory rights, and that respondents proved, beyond a reasonable doubt, that such an error was not a contributory factor to the verdict reached. As stated in *State v. McLeod*, 6 So.2d 145

(La. 1942), *"while the accused is entitled to be protected against an invasion of rights guaranteed by the Constitution, these rights may not be employed on a pretext as a shield to thwart the process of justice." Id.* at 148. As previously stated, the better inquiry is whether or not the appointed attorney, James Weidner, in fact, rendered effective assistance of counsel, which is to be examined and discussed *infra*.

As regarding petitioner's argument that there was a denial or violation of his constitutional rights to due process and equal protection, the parties have stipulated that as of August 14, 1984, the 39 Louisiana inmates on death row (other than the petitioner) were provided with appointed counsel who had the requisite five (5) years admission to the bar. Petitioner contends that based on the language contained in *Bearden v. Georgia*, ___ U.S. ___, 103 S.Ct. 2064 (1983), citing *Williams v. Illinois*, 399 U.S. 235, 260, 90 S.Ct. 2018, 2031 (1970), certain factors must be examined and weighed in order to determine if a violation of equal protection or due process exists:

(1) the nature of the individual interest affected;

(2) the extent to which it is affected;

(3) the rationality of the connection between legislative means and purpose; and

(4) the existence of alternative means for effectuating the purpose.

It should be noted that the petitioner is not attacking Article 512 as being unconstitutional; rather, he is asserting that the trial court did not apply Article 512 in such a manner as to provide petitioner with due process and

equal protection of the laws, *i.e.*, by the trial court's failure to appoint counsel with the requisite five (5) years admission to the bar.

With regard to the first element, petitioner's interest consisted of having effective counsel defend his constitutional rights in accordance with the standard espoused by the United States Supreme Court in *Strickland v. Washington*, ___ U.S. ___ 104 S.Ct. 2052 (1984), to be discussed in Claim II. The extent to which petitioner's interest was affected was, in this Court's opinion, not grave or serious enough to warrant a reversal of his conviction for the main reason that, notwithstanding his lack of five (5) years admission to the bar, Mr. Weidner rendered effective assistance of counsel. The reasons for this decision will be provided *infra*. With respect to the rational relation between the State's interest in prosecuting the petitioner in an efficacious manner and the means employed to effectuate their purpose, this Court finds that the trial court's failure to satisfy the mandate of Article 512 does not outweigh the State's interest in protecting society and seeking justice. Lastly, this Court acknowledges that alternative means were available to the trial court, namely, appointing counsel who had been admitted to the bar for five (5) or more years.

In weighing the aforementioned factors in compliance with *Bearden, supra*, this Court is of the opinion that whatever harm, if any, that occurred to petitioner as a result of the trial court's failure to adhere to Article 512, in its entirety, the State's interest in trying the petitioner on behalf of the residents of Louisiana clearly preponderates in favor of not finding a violation of petitioner's due process or equal protection rights.

Claim II

INEFFECTIVE ASSISTANCE OF COUNSEL

By agreement between the State and the petitioner, this issue was submitted on the record, affidavits, stipulations Habeas Corpus petition and its accompanying affidavits.

The leading case for a claim for ineffective assistance of counsel in [sic] *Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052 (1984). As succinctly stated by the United States Supreme Court:

> *(a) convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defendant. This requires showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unrealiable [sic].*

Id., at ___, 104 S.Ct. at 2054. The Court further indicated that where the defendant fails to demonstrate prejudice, the alleged deficiencies in counsel's performance need not even be considered. According to *Strickland, supra*, *"if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."* *Id.*, at ___, 104 S.Ct. at 2070. The standard for attorney performance remains simply "reasonableness" under prevailing professional norms. Thus, based on the holding in *Strickland, supra*, a convicted defendant complaining of ineffective assistance of counsel has the burden of showing that *"counsel's representation fell below an objective standard of reasonableness."* *Id.*, at 104 S.Ct. at 2065.

Petitioner sets forth several grounds to support his claim that his trial counsel rendered ineffective assistance which can be grouped together:

(1) *Failure to Interview Various Potential Witnesses.*

It was held in *Murray v. Maggio*, 736 F.2d 279 (5 Cir. 1984), that *"complaints of uncalled witnesses are not favored in federal habeas review . . . , and the (defendant) must overcome a strong presumption that (counsel's) decision in not calling . . . a witness was a strategic one."* *Id.*, at 282. This Court is of the opinion that given the strength of the State's case, it was probably strategic on the part of counsel not to call other witnesses who might have made inconsistent statements which would have damaged the defendant's case. Furthermore, under the standard in *Strickland, supra*, hindsight is not considered in testing the reasonableness of counsel's performance. Therefore, petitioner has not demonstrated deficient performance which prejudiced his defense.

(2) *Failure of Counsel to Allow the Venire to be Informed of the Penalties for the Lesser Included Offenses of Second Degree Murder and Manslaughter.*

As stated previously, much deference is given to the strategy of counsel in preparing his defense. This Court can only speculate as to the reasons Mr. Weidner objected to the prosecutor's attempt to inform the venire of penalties for lesser included offenses. Nevertheless, petitioner has failed to show deficient performance on the part of counsel.

(3) *Ineffective Representation at the Voir Dire Stage.*

In reviewing the transcript of the voir dire examination, it is the opinion of this Court that an attorney's intuition must be given respect when he examines potential jurors. It is common knowledge among the legal profession that "intuitive" feelings of the attorney play a large role as to whom he selects as a juror. This Court must label jury selection as "strategy" on the part of counsel, and hold that petitioner has not proven that Mr. Weidner's conduct was not one of strategy.

(4) *Waiver of Closing Argument During Guilt/Innocence Phase.*

It is the opinion of this Court that Mr. Weidner's choice in not giving closing arguments falls within the zone of strategy. *William v. Beto*, 354 F.2d 698, 703 (5 Cir. 1965).

(5) *Failure to Investigate Character and Expert Witnesses as it Related to the Defense of Intoxication and Penalty Phase.*

Petitioner alleges that Mr. Weidner chose only to call three (3) character witnesses at the penalty phase, and therefore, prejudiced his chances of mitigation. This Court opines that Mr. Weidner's strategy in not calling more witnesses to attest to the character of the petitioner was probably to the latter inasmuch as repetition tends to sound insincere. As stated by the Fifth Circuit in *Larsen v. Maggio*, 736 F.2d 215 (5 Cir. 1984):

> *(r)epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.*

Id., at 217. Thus, petitioner has failed to show that he was prejudiced. Petitioner further contends that the two psychiatrists called with regard to the intoxication defense were not offered by Mr. Weidner as experts in the field of alcoholism. A review of the transcripts show that both doctors were given hypothetical questions to a situation where an individual consumes a considerable amount of alcohol, and then commits the acts of which petitioner was accused. The opinion of one psychiatrist was that the person was suffering from a toxic psychosis secondary to alcohol. The other psychiatrist testified on direct that the petitioner probably had a sociopathic personality. It is the opinion of this Court that Mr. Weidner's examination was both effective and meaningful considering the strength of the State's case, and that any errors he may have committed with regard to his examination was not sufficient to prejudice the petitioner's defense.

(6) *Failure of Counsel to Inform Defendant of his Right to Testify.*

Petitioner's Claim III, concerning his denial of the right to decide whether or not to testify, will be addressed here insofar as it bears on the issue in ineffective assistance of counsel. After reviewing the record, affidavits and stipulations, this Court finds no evidence whatsoever to support petitioner's allegation that he was not informed by counsel of his right to testify. Therefore, this claim is without merit.

(7) *Failure of Counsel to Object to Remarks Made by the Prosecutor not in Evidence.*

Even should this omission by counsel be considered as unreasonable or below the standard enunciated in *Strickland, supra,* petitioner has failed to prove prejudice sufficient to undermine the confidence in the outcome.

In light of the *Strickland, supra,* holding, petitioner did not meet his burden of proving that counsel's performance was deficient, and that such performance prejudiced the petitioner so seriously that he was deprived of a fair trial. In summary, petitioner has failed to show a reasonable probability that, but for the alleged errors committed by his trial counsel, the jury would have had a reasonable doubt respecting his guilt. *Murray v. Maggio,* 736 F.2d 279 (5 Cir. 1984). This Court notes that not only was Mr. Weidner's representation "reasonable" given the totality of the circumstances, he demonstrated a remarkable ability to defend his client in light of the enormous

amount of evidence in the hands of the prosecution. Truly, he demonstrated wisdom beyond his years.

Claim III

FAILURE OF THE COUNSEL TO INFORM PETITIONER OF HIS RIGHT TO TESTIFY

This issue was addressed under Claim II(6), *supra.*

Claims IV - XX

In his petition for habeas corpus, petitioner also claims that his conviction, or in the alternative, his death sentence, should be vacated because of a host of other errors. This Court has exhaustively studied the record, the transcripts, affidavits and stipulations in connection with petitioner's claims, and believes that those other claims are so seriously lacking in merit that no reasonable jurist could come to a conclusion that is different from the conclusion reached by the Louisiana Supreme Court. *Barefoot v. Estelle,* ___ U.S. ___, 103 S.Ct. 3383, *reh. den.* 104 S.Ct. 209 (1983). As to these other claims, petitioner has not made a substantial showing of the denial of a constitutional right, recognized by either the State or Federal Constitution. Accordingly, all of petitioner's remaining claims are rejected by this Court.

For the reasons stated hereinabove, petitioner's claims for post-conviction habeas corpus relief are denied.

GRETNA, LOUISIANA, THIS 8th DAY OF February, 1985.

/s/ M. Joseph Tiemann
M. JOSEPH TIEMANN,
JUDGE, DIV. "G"

STATE OF LOUISIANA	24TH JUDICIAL DISTRICT COURT STATE OF LOUISIANA PARISH OF JEFFERSON
VERSUS	NO. 79-2841,
ROBERT SAWYER	DIVISION "G"

FILED: _____, 1985

_____
DEPUTY CLERK

JUDGMENT

Petitioner's post-conviction Application for Habeas Corpus came for hearing on the 25th day of July, 1984, and by agreement of counsel, was submitted on the record, affidavits, stipulation and memoranda of law.

PRESENT: Elizabeth W. Cole and
Catherine Hancock
Attorneys for petitioner,
Robert W. Sawyer;

William C. Credo, III,
Assistant District Attorney
for Respondents, Ross Maggio,
et als.

IT IS ORDERED, ADJUDGED AND DECREED, that Petitioner's Writ of Habeas Corpus be, and is hereby DENIED.

JUDGMENT READ, RENDERED AND SIGNED in Open Court this 8th day of February, 1985.

/s/ M. Joseph Tiemann
M. JOSEPH TIEMANN,
JUDGE, DIV. "G"

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.
/s/ Kathy Wazda
DEPUTY CLERK

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA
EX REL
ROBERT SAWYER NO. 85-KP- 0660

VS.

ROSS MAGGIO, JR.,
WARDEN,
LOUISIANA STATE
PENITENTIARY

IN RE: Sawyer, Robert; Applying for Supervisory Writs & Habeas Corpus; Parish of Jefferson 24th Judicial District Court Div. "G" Number 79-2841

May 13, 1985

Granted with Per Curiam. (Attached)

JLD

JAD

PFC

JCW

LEMMON, J., concurs. This Court's determination of relator's claim may turn on evidence regarding defense counsel's waiver of closing argument during the guilt phase.

Supreme Court of Louisiana
May 13, 1985

/s/ Illegible
Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

No. 85-KP-0660 May 14, 1985

STATE EX REL ROBERT SAWYER

versus

ROSS MAGGIO, JR., WARDEN,
LOUISIANA STATE PENITENTIARY

PER CURIAM.

In our previous order we instructed the district court to conduct an evidentiary hearing on whether defendant received effective assistance of counsel and to reconsider defendant's entire application in light of that evidence. The parties and the district court misconstrued our order of an evidentiary hearing as being limited to the issue of whether counsel was ineffective because he had not been admitted to the bar for at least five years. Our concerns were not so limited, however, and we now remand the case for an evidentiary hearing on all of the defendant's allegations of ineffective assistance of counsel during the preparation, trial and penalty phase of his case.

WRIT GRANTED; CASE REMANDED FOR EVIDENTIARY HEARING.

---

* * *

[186] THE COURT:

What I don't want to do is have to go through and cause again the Supreme Court to go that extra, they are burdened enough. I really think I'm going to let the ruling stay, and let's do that. Follow your suggestion. We'll not tamper with the stay order. We will deny the petition. That way, if they say well, I went beyond what they intended, so be it, certainly all right. But if I did not rule, and they say, "Well, we are waiting on a ruling from the trial court." Then there would be a further unduly delay. So, the ruling is that the petition is denied.

MR. CREDO:

Does the Court wish to dictate its reasons for the denial into the record?

THE COURT:

[187] What I would like to do is – again, the reasons are similar to what was reasoned earlier in the written reasons for the denial. I am as convinced as ever, in some areas even more convinced, having heard the statements and testimony of witnesses that what we had in this case, which Mr. James Weidner of this Parish defended Mr. Robert Sawyer, that we had a mature and reasoned, and in some ways seasoned certainly beyond his physical years, for the defense of this gentleman.

Was the defense successful, of course, it was not. I mean that is obvious. We wouldn't be here today if it was successful. He would be free somewhere in Tennessee, or somewhere else.

Was it lacking? Someone once said, you know, "Even Homer nods", which means that he fell asleep

one night and didn't complete a paragraph, or a sentence, or left a dangling participle. This is an imperfect world.

We had a man who is an acknowledged and accepted expert saying, "I would have done this differently, but there are exceptions in each rule."

I am as convinced as ever, as I say in some areas more convinced, maybe I did detect, shall I call it a weakness in the defense that I was not privy to, or aware of before, but on [188] balance, on balance I cannot imagine a better defense. Would it have been different? Of course, we all do things differently.

Mr. Weidner's testimony, for example, as to why he chose not to give that closing argument, it was reasoned and well reasoned out. The question here is was the defense adequate? He said he was very familiar with the trial tactics of Mr. Boudousque. It has been alleged that certain law enforcement officers have good guy and bad guy type things. One guy strenuously interrogates, and when he leaves, the defendant, or the person being questioned, is breathless and afraid. Another officer comes in and says "Hi, how are you doing?" He says "How am I doing?" He says "That man just threatened to take my head off with his left foot." That is – "You got to be joking, that is a mean thing to do. Tell me all about it."

Apparently, this was thought to be the tactic of Mr. Boudousque. "Hi, ladies and gentlemen, we're here today. We have five elements. I think I have got them all. Well, that is about it. Thank you so much." And then when the defense lawyer gets up and says this, this, and this, then he says, "This is preposterous, I can't stand the quiet no longer", and just thunder away. I'm just conjecturing because I have never been in a case with Mr. [189] Boudousque.

But my point is that these things were not done in a cavalier fashion, not done without some reasoning. In fact, it was charming in a good sense of that term, that Mr. Weidner stated, and I'm sure just a small amount of blushing, that he practices his speech in front of his bath room mirror. He had apparently, and this Court feels, a feeling of, how shall I say it, it's a dedication I guess is the term I am searching for, to this cause. He was espousing at the time, namely, the proper and best defense he could to Mr. Sawyer.

It's interesting, and I note this again, I guess it's a question of style. Mr. Beevers was so convinced that the man had little or no chance to succeed at a trial on the matter, that he sought additional help from a man more wise in his experience, by his own admission, he said "Go to the defendant and beg and plead with him", do this and this. And this is the best you can do.

Mr. Beevers apparently was so upset at this rejection that he chose to ask to have the Court allow him to withdraw from the case. I am sure that Mr. Weidner, had he been apprised of this, knowing of this, still having put his hands to the plow, kept along the furrow. He plowed as straight as he could.

[190] I think the question is did he turn his back and say "See you later." He hung with it to the end. Was he successful, no. Was he correct, who knows. Everybody has a different style, in my opinion. But these are my rambling reasons.

The man did not only the best he could, but on reflections he did very good. I said in earlier reasons if the Court would like me to comment, the Supreme Court, on the five year rule, I served in the legislature for ten years. I know a little something about the

legislative intent of these matters. And it's my opinion, I didn't draft, or was part of this particular five year rule, but it's my opinion that it's there as a floor. In other words, we have to have some criteria, a minimum shall be to insure that people out there are able to defend, or function in this particular case properly; that we say "You have to have been in business at least five years."

When we find that in truth and in fact someone meets specific criteria of ability and knowledge and dedication and understanding, then this artificial, if you will, floor, or criteria must give way to reality.

It's my opinion, as I say, enough was here shown to say there was effective counsel. There was - all the other things that were to be [191] addressed have been addressed. And those are my reasons for denying the petition.

Ms. COLE:

Your Honor, we will notify the Court of our official intent to apply to the Supreme Court.

THE COURT:

Thank you all.

(Discussion off the record.)

THE COURT:

As the Court appreciates it, there's been an oral motion, rather an oral notice of appeal. The Court would like that to be filed by written notice, or motion, if you will, which, of course, is granted.

The Court feels that sixty days should be sufficient time. If it's not, certainly an extension would be entertained. And if that is the case, give sixty days for perfecting the appeal.

Ms. COLE:

Sixty days from the physical filing of the notice, or sixty days from today?

THE COURT:

Let's give –

MR. CREDO:

The court reporter has sixty days from today to file the transcript.

(End of proceedings.)

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE EX REL ROBERT SAWYER

VS. NO. 85-KP- 2056

ROSS MAGGIO, JR.
WARDEN LOUISIANA
STATE PENITENTIARY

IN RE: Sawyer, Robert; Applying for Supervisory Writs and Writ of Habeas Corpus; Parish of Jefferson 24th Judicial District Court Div. "G" Number 79-2841

December 13, 1985

Denied.

WFM

FAB

JCW

HTL

DIXON, C.J., CALOGERO & DENNIS, J.J., would grant the writ.

Supreme Court of Louisiana
December 13, 1985

/s/ Illegible
Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA
A TRUE COPY

/s/ John Tarlton Olivier
John Tarlton Olivier
Deputy Clerk of Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROBERT SAWYER	CIVIL ACTION
versus	NUMBER 86-223
FRANK BLACKBURN, WARDEN	SECTION "I" (4)

FINDING AND RECOMMENDATION

On January 21, 1986, this matter was referred to the United States Magistrate for the purpose of conducting a hearing, including an evidentiary hearing, if necessary and submission of proposed findings and recommendations for disposition pursuant to 28 U.S.C. §636(b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases.

Robert Sawyer is a state prisoner incarcerated in the Louisiana State Penitentiary, Angola, Louisiana. He was convicted on September 19, 1980 of First Degree Murder after trial by jury in the Twenty-Fourth Judicial District court for the Parish of Jefferson, State of Louisiana. The jury recommended that petitioner be sentenced to death.

Petitioner's conviction and sentence was affirmed on appeal. State v. Sawyer, 422 So.2d 95 (La. 1982). Upon application for certiorari to the United States Supreme Court, the case was remanded for consideration in light of the holding in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 335 (1983); See Sawyer v. Louisiana, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). Upon remand, the Louisiana Court again affirmed the death sentence. Sawyer v. Louisiana, 442 So.2d 1136 (La. 1983). The United States Supreme Court denied a subsequent

application for certiorari. 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984).

Petitioner was represented at the trial court level by James S. Weidner, Jr., Esquire, and by Samuel Stephens, Esquire. He was represented on his direct appeal by David Katner, Esquire, and by George Escher, Esquire.

In his application for habeas corpus relief under 28 U.S.C. §2254, petitioner alleges a violation of the Constitution and laws of the United States as follows:

1. "The death-qualification of petitioner's guilt-phase jury was illegal and unconstitutional."

2. "Petitioner was denied the right of effective assistance of counsel in violation of his rights of equal protection and due process under the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States."

3. "Petitioner received ineffective assistance of counsel from his court appointed attorney in violation of his rights under the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States."

4. "Prosecutorial misconduct during closing argument in the penalty phase of the trial rendered petitioner's trial fundamentally unfair in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution and Article 1, Section 2, 3 and 13 of the Louisiana Constitution of 1974."

5. "Petitioner was denied his right to a fair sentencing under the Eighth and Fourteenth Amendments of the United States Constitution and under the Louisiana Constitution, because the prosecutor injected an arbitrary factor into the jurors' deliberations by explicitly misleading them concerning their role as final judges in imposing the death sentence."

6. "Petitioner was denied his Fifth and Fourteenth Amendment rights guaranteed by the United States Constitution and his right under Art. 1, Section 16 of the Louisiana Constitution of 1974 to decide for himself whether or not he would testify at trial."

7. "The trial court did not instruct the jury during the guilt/innocence phase of petitioner's trial that the defendant is not required to testify and that no presumption of guilt may be raised, thereby violating petitioner's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the laws and Constitution of the State of Louisiana."

8. "The trial court's instruction to the jury at the guilt/innocence phase of his trial improperly relieved the State of its burden of proof beyond a reasonable doubt that petitioner had the specific intent to kill or inflict great bodily harm, an essential element of the crime of first degree murder, in violation of petitioner's rights under the laws and Constitution of the State of Louisiana and the Sixth, Eighth and Fourteenth

Amendments of the United States Constitution."

9. "The trial court's instructions to the jury at the guilt/innocence phase of petitioner's trial improperly relieved the State of its burden of proof beyond a reasonable doubt that petitioner had the specific intent to kill or inflict great bodily harm, an essential element of the crime of first degree murder, in violation of petitioner's rights under the laws and Constitution of the State of Louisiana and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution."

10. "The trial court excused jurors, who expressed only general opposition to the death penalty, depriving petitioner of the right of a jury composed of a representative cross section of the community as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the laws and Constitution of the State of Louisiana and the standards set in Witherspoon v. Illinois, 391 U.S. 510 (1968)."

11. "The imposition of a death sentence where one of the aggravating circumstances is not supported by the evidence violates the Eighth and Fourteenth Amendments."

12. "Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated by the introduction of inadmissible evidence that defense counsel had no effective opportunity to rebut during the capital sentencing hearing said evidence injected on arbitrary factor into the sentencing hearing.

13. "Petitioner's sentence is excessive and disproportionate."

14. "Petitioner's sentence is arbitrary and capricious."

15. "Electrocution is a cruel and unusual means of punishment."

16. "Petitioner's sentence is invidiously discriminatory."

17. "Capital punishment is an excessive penalty."

18. "The cumulative effect of violations of petitioner's rights is in itself a violation of petitioner's constitutional rights."

These grounds[1] were presented in an application for post-conviction relief to the state trial court. An evidentiary hearing was conducted by the trial court before denying petitioner's application.

Petitioner applied for writs of certiorari and review with the Louisiana Supreme Court of the trial court's denial of his application. The Louisiana Supreme Court denied petitioner's application without comment. Sawyer v. Maggio, 479 So.2d 360 (La. 1985). Application for reconsideration was denied. 480 So.2d 313 (La. 1985).

The duplicate record of the Louisiana Supreme Court is before this Court. This record is sufficient for the purpose of adjudication of petitioner's claim and a federal evidentiary hearing is not necessary. 28 U.S.C.

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[1] Grounds 4, 11 and 12 additionally were presented to the Louisiana Supreme Court in petitioner's appeal of his conviction.

§254(b); Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

We adopt the following statement of facts which are set forth in the opinion of the Supreme Court of Louisiana, recounting the events which led to petitioner being charged with murder.

> "A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.
>
> On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.
>
> Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However. defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absense [sic], defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or even revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then

beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane 'just how cruel he (defendant) could be'. When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ('They've killed Fran and they're trying to kill me' were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she

subsequently died." [Footnotes omitted]. State v. Sawyer, 422 So.2d 95, 97-98 (La. 1982).

1. The Death Qualification of Petitioner's Guilt-Phase Jury Was Illegal and Unconstitutional

Petitioner claims that he was denied his right to a fair trial under the Sixth, Eighth and Fourteenth Amendments because a qualified group of venire persons were excluded from both the penalty phase and the guilt phase of his trial on the grounds that they were opposed to the death penalty.

This issue is without merit, having been foreclosed by the Supreme Court's recent decision in Lockhart v. McCree, ___ U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); See Brogdon v. Blackburn, 790 F.2d 1164 (5th Cir. 1986).

2. Ineffective Assistance of Counsel

Petitioner raises claims of ineffective assistance of counsel in grounds two and three of his application. Since the claims in both grounds are related, we will treat both claims together.

Petitioner first contends that he was denied the effective assistance of counsel by the failure of the state trial court to appoint an attorney with at least five years of experience to represent him.

Petitioner, an indigent, was entitled to court-appointed counsel. He was originally represented by Wiley Beevers who had been admitted to practice in Louisiana for over five years. Mr. Beevers, after reaching irreconcilable

differences,[2] with petitioner was allowed to withdraw as counsel. The state trial court appointed James Weidner, Jr. to represent petitioner. Mr. Weidner advised the court that he had not been admitted to practice for five years but was told to associate counsel with the required number of years of experience.

Mr. Weidner, at the time of petitioner's trial, had been admitted to the practice of law approximately four years. Mr. Weidner attempted, but was unsuccessful in securing an attorney to assist him at trial. (R., Tr., Evidentiary Hearing, July 12, 1985, p. 120). He was successful, however, in engaging Samuel B. Stephens to assist him with petitioner's case.[3] At the time of trial, Mr. Stephens was just a few weeks shy of having been admitted to practice five years. (R., Petitioner's State Exhibit Z).

Louisiana law provides:

> "When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of

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[2] Mr. Beevers testified during the state's evidentiary hearing that the irreconcilable differences consisted of petitioner refusing to follow his advice to enter a plea of guilty to second degree murder or first degree murder without capital punishment. (R., Evidentiary Hearing, July 12, 1985, p. 16). Had petitioner accepted the offer of a plea agreement, he could only have received a sentence of life imprisonment. LSA R.S. 14:30.1.

[3] Mr. Weidner also secured the services of John Tooley, an attorney with over twenty-eight years experience, to assist him in pre-trial hearings.

> R.S. 15:145. Such counsel must be assigned before the defendant pleads to the indictment, but may be assigned earlier. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel." Louisiana Code of Criminal Procedure (La. C.Cr.P. Art. 512).

Although it may be necessary to consider the performance by Messrs. Weidner and Stephens in connection with the above claim, the issue raised by petitioner is not an ineffective assistance of counsel claim, but essentially a denial of equal protection.

The state trial judge, after an evidentiary hearing, concluded that noncompliance with the directive of Article 512 is not fatal to a capital conviction when a defendant actually receives effective assistance of counsel.

The trial judge for reasons orally assigned held:

> "The man [Weidner] did not only the best he could, but on reflection he did very good. I said in earlier reasons if the Court would like me to comment, the Supreme Court, on the five year rule, I served in the legislature for ten years. I know a little something about the legislative intent of these matters. And it's my opinion, I didn't draft, or was part of this particular five year rule, but it's my opinion that it's there as a floor. In other words, we have to have some criteria, a minimum shall be to insure that people out there are able to defend, or function in this particular case properly; that we say 'You have to have been in business at least five years.'

> When we find that in truth and in fact someone meets specific criteria of ability and knowledge and dedication and understanding, then this artificial, if you will, floor, or criteria must give way to reality." (R., Tr., Evidentiary Hearing, July 12, 1985, p. 190).

Prior to the Louisiana Supreme Court's remand with directions to conduct an evidentiary hearing, the state trial court issued written reasons substantially identical to those above in its inital [sic] denial of petitioner's application. (R., Reasons for Judgment, February 8, 1985, pp. 2-3).

At the conclusion of the evidentiary hearing conducted on July 12, 1985, the state trial judge denied petitioner's application for post-conviction relief on the above, as well as other grounds raised.

The Louisiana Supreme Court denied, without comment, petitioner's application for certiorari and review of the trial court's ruling.

The requirement that an attorney possess a minimum of five years experience before he can be appointed to represent a defendant charged with a capital crime is a requirement of state law.

While we are bound by determinations of state law by courts of that state, Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961); Willeford v. Estelle, 538 F.2d 1194 (5th Cir. 1976); Hall v. Wainwright, 493 F.2d 37 (5th Cir. 1974), we are unable to locate any other case in which the highest court of Louisiana has

given the same interpretation to Article 512 as did the state trial court herein.[4]

The state trial court in its written reasons of February 8, 1985 concluded that petitioner's due process and equal protection rights were not violated by the failure of the court to appoint him an attorney with five or more years experience. (R., Reasons for Judgment, supra, p. 5). We do not have to reach the issue of whether petitioner's due process or equal protection rights were violated since any alleged breach of those rights was harmless beyond a reasonable doubt and, consequently, does not raise a federal constitutional question. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The state trial court concluded in its assigned oral reasons that petitioner received effective assistance of counsel. The trial judge found, "[in Mr. Weidner] . . . we had a mature and reasoned and in some ways seasoned certainly beyond his physical, years, for the defense of

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[4] The refusal of the Louisiana Supreme Court to grant writs in the case *sub judice* does not constitute a ruling on the merits. See State v. Guillot, 353 So.2d 1005, 1007 n.1 (La. 1977); Coco v. Winston Industries, Inc., 341 So.2d 332, 335 n.1 (La. 1977). The Louisiana Supreme Court appeared to take the same approach taken by the state trial court herein in determining whether the dictates of Article 512 were violated in State v. Motton, 395 So.2d 1337, 1342 (La. 1981). cert. denied, 454 U.S. 850, 102 S.Ct. 289, 70 L.Ed.2d 139 (1981), when it held, on a record silent as to the length of time of practice of an appointed attorney, that the defendant failed to establish prejudice.

this gentleman."[5] (R., Evidentiary Hearing, July 12, 1985, p. 187).

A review of the state record convinces us that petitioner received the effective assistance of counsel in Mr. Weidner's representation.

The only prejudice that petitioner seeks to establish in not having been represented by counsel with at least five years experience is the alleged deficient conduct set forth in his claim of ineffective assistance of counsel. We find that claim to be meritless for reasons assigned below.

The state court record and the trial transcript reveal that the evidence of petitioner's guilt was ample. Petitioner's exculpatory statement introduced into evidence at trial by the state alleged that Lane was responsible for the acts causing the victim's death. However, defendant did not seriously contest at trial his involvement in the beating and burning of the victim. The theory of his defense was that he lacked the specific intent to commit

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[5] In the earlier stages of the criminal proceeding, petitioner was represented by Mr. Beevers, who met the time qualifications of Article 512. After Mr. Beevers withdrew as petitioner's attorney, Mr. Weidner along with Mr. John Tooley represented petitioner at hearings on pre-trial motions. At trial, Mr. Weidner had the assistance of Sam Stephens. Mr. Tooley had been a member of the bar for over twenty years. Mr. Stephens had been a member for four years, eleven months and a few weeks. Although Messrs. Tooley and Stephens were not appointed by the court to represent petitioner, a distinction perhaps with little difference, it would appear that petitioner was at all times represented by counsel within the spirit, if not the letter of Article 512.

first degree murder due to intoxication. Ms. Shano testified that she saw petitioner kick Ms. Arwood into the bathtub rendering her unconscious. (R., Tr., pp. 1146-49). She also saw petitioner pour hot water on Ms. Arwood, walk all over her back as she was lying on the floor and beat her with a belt. (R., Tr., pp. 1149-50). Ms. Shano also testified that she overheard petitioner say, "[I] can show you how cruel I can be . . . " just before she smelled something burning. (R., Tr., p. 1151). Ms. Shano also overheard conversations between Lane and petitioner which indicated petitioner set fire to Ms. Arwood. (R., Tr., p. 1152).

The fingerprints found on the can of lighter fluid used to set Ms. Arwood on fire belonged to petitioner. The Louisiana Supreme Court found the evidence "ample" from which a rational juror could have found that the defendant was engaged in the perpetration of aggravated arson and that he had acted with specific intent. State v. Sawyer, supra, 422 So.2d at 99. The court's determination is entitled to great weight. Wingo v. Blackburn, 786 F.2d 654 (5th Cir. 1986). Webster's New Collegiate Dictionary defines ample as "generous or more than adequate in size, scope, or capacity . . . generously sufficient to satisfy a requirement or need".

Petitioner does not address the deficiency of appellate counsel, both of whom he claims had not been admitted to practice for more than five years at the time of their representation of him.

The record reflects that these attorneys presented both meaningful and serious issues to the Louisiana Supreme Court in petitioner's appeal.

Petitioner does not suggest other issues appellate counsel might have urged on appeal. Petitioner must establish " . . . [t]hat counsel's errors were so serious that counsel was not functioning as the counsel guaranteed to the defendant by the sixth amendment." McCrae v. Blackburn, 793 F.2d 684 (5th Cir. 1986). Any error in the appointment of appellate counsel with more than five years experience to represent petitioner is likewise harmless beyond a reasonable doubt.

Petitioner's claim that he was denied equal protection of the law in the appointment of counsel with less than five years experience is without merit.

Petitioner raises several instances of alleged deficient conduct on the part of his counsel in his claim that he did not receive the effective assistance of counsel.

He claims that counsel:

a) was admitted to practice for less than five years;

b) objected to the prosecutor advising the jury panel during voir dire of the penalties for lesser included offenses;

c) failed to object during voir dire to the prosecutor's reference to evidentiary facts that were not later established at trial;

d) failed to conduct a meaningful voir dire; e) failed to discuss with petitioner the nature of the defense;

f) failed to allow petitioner to testify during the guilt phase of the trial;

g) failed to adequately prepare defense witnesses for trial;

h) failed to call an expert that would have been able to give an opinion as to the effect of alcohol on petitioner;

i) failed to present a closing argument during the guilt phase of the trial;

j) presented an unprepared defense during the penalty phase of trial;

k) failed to object or move for mistrial during improper argument by prosecution during penalty phase of trial;

l) failed to object to erroneous instructions given the jury by the court during guilt and penalty phase of trial; and

m) failed to make effective closing argument during penalty phase of trial.

In order to prevail on a claim of ineffective assistance of counsel, petitioner must show: 1) that his counsel's performance was deficient; and, 2) that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Murray v. Maggio, 736 F.2d 279 (5th Cir. 1984).

Under the Supreme Court's formulation of the required showing of prejudice,

> "[T]he defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, supra, 104 S.Ct. at 2068.

If the Court finds that petitioner has made an insufficient showing as to either one of the two stages of

inquiry, i.e. deficient performance or actual prejudice, the Court may dispose of the claim without addressing the other stage. Strickland v. Washington. supra, 104 S.Ct. at 2069-70.

In determining whether counsel's performance falls below the objective standard of reasonableness, our scrutiny should be "highly deferential", recognizing " . . . strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance". Strickland v. Washington, supra, 104 S.Ct. at 2066; Marler v. Blackburn, 777 F.2d 1007 (5th Cir. 1985).

Petitioner may not simply allege prejudice, he must affirmatively prove it. Strickland v. Washington, supra, 104 S.Ct. at 2067; Celestine v. Blackburn, 750 F.2d 353 (5th Cir. 1984), cert denied, ___ U.S. ___, 105 S.Ct. 3490, ___ L.Ed.2d ___ (1985); Hayes v. Maggio, 699 F.2d 198 (5th Cir. 1983).

We now treat petitioner's individual claims of ineffective assistance of counsel.

a) Counsel's Admission To Practice For Less Than Five Years

Mere inexperience alone will not determine whether a defendant received effective assistance of counsel. The test rather is counsel's performance in representing the defendant. United States ex rel. Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975), cert. denied, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109; United States v. Badolato, 701 F.2d 915 (11th Cir. 1983).

Petitioner has not established that trial and appellate counsel's failure to meet the five year admission to practice minimum resulted in any prejudice to him. Counsel were effective. Petitioner does not show that the results of the trial or appeal would have been any different had counsel with more experience been appointed.

b) Counsel Objected To The Prosecutor Advising The Jury Panel During Voir Dire Of The Penalties For A Lesser Included Offense

Petitioner suggests that the jury should have been made aware that he could have been sentenced: 1) to life imprisonment, without benefit of parole, probation or suspension of sentence if it returned a guilty verdict of second degree murder; or, 2) twenty years imprisonment on a verdict of manslaughter. Petitioner does not explain, however, how this prejudiced him since it was possible for the jury to recommend a sentence of life imprisonment on his conviction of first degree murder. Petitioner's contention that the jury might have returned a verdict of manslaughter, had it known he could have received twenty years imprisonment, has even less support in light of the evidence.

We are convinced, in view of the evidence, that the verdict would not have been different had the jury been made aware of the alternate penalties.

c) Counsel Failed To Object During Voir Dire To The Prosecutor's Reference To Facts Not Later Established At Trial

Petitioner singles out two references made by the prosecutor during voir dire examination to support his

claim. The references are to claims by the prosecutor that " . . . "[S]he [the victim] had a hammer shoved up her vaginal area as well as other incidents"; and "she was halfway drowned in the bathtub and set on fire after she was raped". (R., Petition, pp. 12-13).

The second referenced statement above was not a mischaracterization of the evidence ultimately produced during the trial. There is support in the evidence offered at trial that the victim was "halfway" drowned in the bathtub and set on fire after she was raped.

There was no evidence introduced during trial, however, which would support the first referenced statement that a hammer was used in the attack upon the victim.

Had counsel objected to the remark during voir dire, the jury's verdict would not have been different. The reference by the prosecutor to the use of the hammer, viewed in perspective to the actual torture and brutality inflicted upon the victim, could have had only an inconsequential effect on the jury's verdict.

Defense counsel did request a mistrial during the testimony of a state witness who alluded to the possible use of a hammer during the attack on the victim. The court denied the motion and instructed the jury that up to that point in the trial, there had been no testimony about a hammer and to disregard the witness's comment. (R., Tr., pp. 1282-1285).

Petitioner suffered no prejudice by the prosecutor's earlier remark.

d) Counsel Failed To Conduct A Meaningful Voir Dire

Petitioner complains that counsel failed to inquire during voir dire examination of the prospective jurors' prior jury service and their attitude regarding the failure of a defendant to testify in his own behalf.

Petitioner does not articulate how he was prejudiced by counsel's failure to find out if a juror had prior jury service. It would be pure speculation to consider that one or more of the selected jurors would have been excused if it was known that he or she had served on a prior jury.

Additionally, petitioner has not established if there were in fact any jurors who had prior jury service.

Likewise, counsel's failure to inquire of the jurors' attitude regarding a defendant's failure to take the stand does not entitle petitioner to relief herein.

Counsel did not plan to call petitioner to the stand during the guilt phase of the trial. He testified during the state evidentiary hearing that he did not ask the prospective jurors about their attitude toward a defendant not taking the stand on his behalf, to avoid emphasizing the fact that petitioner would not in fact testify. It was a tactical decision. (R., Evidentiary Hearing, July 12, 1985, pp. 146-47).

e) Counsel Failed To Discuss The Nature Of His Defense With Petitioner

Petitioner claims that counsel did not consult with him about his defense and refers to an affidavit filed in the state record as Exhibit "AA" in support of this claim.

The allegations in petitioner's affidavit belie any contention that he was not apprised of the defense that was going to be presented on his behalf. He admitted discussing the case with counsel on several occasions, and on one occasion was told that "alcohol psychosis" would be advanced as a defense to the crime.

Petitioner's claim that he was not advised of his defense before trial is contradicted by his own affidavit, as well as Mr. Weidner's testimony during the state evidentiary hearing.

f) Counsel Failed To Advise Petitioner Of His Right To Testify On His Own Behalf

Petitioner, in connection with this claim, complains that he was not given the opportunity by his attorney to make his own decision as to whether he would testify on his own behalf. Petitioner claims that he would have testified given the choice.

Petitioner, however, does not indicate what his testimony would have consisted of, had he been allowed to testify. He testified during the penalty phase of the trial that he remembered little about the events of the night. (R., Tr., p. 1508).

The fact of petitioner's prior conviction for involuntary manslaughter could have been revealed during the guilt phase of the trial had petitioner taken the stand, a factor that could not but further damage any defense petitioner presented. In fact, petitioner's prior conviction, and its possible revelation during the guilt phase of the trial was a major reason his counsel decided not to put

him on the witness stand. (R., Evidentiary Hearing, July 12, 1985, p. 126).

Petitioner's exculpatory statement, given the police shortly after his arrest, in which he put the blame for the victim's injuries on his co-defendant was read to the jury during the state's case in chief.

Had petitioner testified at trial, he may have had difficulty in reconciling for the jury his defense of lack of intent to commit the crime due to intoxication, and his prior statement that someone else committed the crime.

We cannot second-guess counsel's strategy in not calling petitioner to the stand. The decision not to do so was not outside the realm of effective representation.

Mr. Weidner testified during the state evidentiary hearing that he consulted with petitioner on several occasions concerning not calling him as a witness. (R., Evidentiary Hearing, July 12, 1985, p. 124-25). It was not brought out, however, if counsel, as claimed by petitioner, gave him an opportunity to make the decision himself as to whether he wanted to testify. Petitioner does not claim he made a request of his counsel to testify, he merely asserts he was not given an opportunity to make that choice.

Even assuming that petitioner in fact was not given the opportunity by counsel to make that decision, he has failed to establish that he was prejudiced by the alleged error. Petitioner does not indicate what his testimony would have been had he testified during trial.

g) Counsel Failed To Adequately Prepare Defense Witnesses For Trial

Petitioner complains that his attorney called only five witnesses in his defense and spent only one-half hour with two of those witnesses, his sister and brother-in-law, in preparing their testimony for trial.

Brevity of time spent by counsel in preparing a case is not of itself sufficient to provide relief to a habeas applicant. Schwander v. Blackburn, 750 F.2d 494 (5th Cir. 1985).

Petitioner does not indicate what additional facts would have been established at trial had counsel spent more time with the two witnesses mentioned above. It is unclear by petitioner's statement that "a total of only five defense witnesses were called to testify," whether he is complaining that other witnesses should have been called. One of petitioner's present counsel filed an affidavit in the state court proceedings that petitioner's sister gave her the names of several witnesses who would have been available to testify at petitioner's trial. (R., Application for Writs to Louisiana Supreme Court, No. 84 KP 0919, Exhibit S). This list of potential witnesses all appear to be relatives of petitioner. There are no allegations, however, as to what their expected testimony would be.

Without specific allegations of the expected testimony of other witnesses and some indication that they would have been available to testify at trial, petitioner has failed to establish prejudice.

h) Counsel Failed to Call An Expert To Give An Opinion As To The Effect Of Alcohol On Petitioner

Petitioner, while acknowledging that his attorney obtained the testimony of two physicians in aid of his defense of toxic psychosis, complains that his attorney should have procured other experts who, presumably after examining petitioner, would be able to testify as to the effect alcohol has on petitioner.

The two experts who testified on petitioner's behalf were Doctors Albert DeVilliere and Genevieve Arneson, psychiatrists, who had been appointed to a pre-trial lunacy commission to examine petitioner. Each examined petitioner approximately for one-half hour in connection with that earlier proceeding and concluded that petitioner understood the nature of the charges filed against him and was able to assist his attorney in his defense.

Counsel for petitioner was successful at trial in eliciting opinions from these two experts which supported the defense of toxic psychosis. (R., Tr., pp. 1337, 1338, 1409).

Petitioner complains, however, that these opinions were based upon a set of hypothetical facts only, and that counsel should have procured an expert who could have testified as to the actual effect of alcohol on him.

Petitioner does not suggest what type of examination would produce the type of results he seeks or that those results would even be obtainable.

Dr. DeVilliere testified both at trial and during the sanity commission proceeding that there are no tests to determine a man's intent or the effect of toxic psychosis

on that intent at the time of the crime. He claimed that a physician would have to be at the scene of the crime during its commission to be in a position to render such an opinion. (R., Tr., pp. 436, 1314).

Petitioner offers no evidence that establishes he actually suffered from toxic psychosis to justify our considering his claim.

i) Counsel Failed to Present A Closing Argument During The Guilt Phase of Trial

Petitioner complains that his attorney was deficient in not presenting a closing argument during the guilt phase of trial.

Mr. Weidner testified during the state evidentiary hearing that he made a deliberate decision not to give a closing argument based upon two separate considerations. First of all, he was knowledgeable of the prosecutor's reputation for presenting strong and damaging rebuttal arguments. Since the prosecutor had given what Weidner considered to be a "mild" closing argument, he hoped to prevent, by not giving a closing argument, the prosecutor presenting a stronger rebuttal. (R., Evidentiary Hearing, July 15, 1985, p. 128).

Secondly, Weidner realized the strong case the state had against his client as to his guilt and felt the chance of salvaging anything for his client was in the penalty phase where he hoped for a recommendation of life imprisonment. To further any possibility for success in the penalty phase, Weidner decided not to risk what credibility he may have had with the jury by advancing arguments as

to petitioner's innocence that the jury might perceive to have been totally unsupportable.

While an attorney's decision to waive closing argument might ordinarily deprive a defe ant of the effective assistance of counsel, we do find that to be the result in the case before us.

Mr. Weidner believed the case against his client on the guilt phase to be very strong. Prior counsel, Beevers, had withdrawn from the case after he and Sam Dalton, a Jefferson attorney experienced in the defense of capital cases, failed to convince petitioner to accept a plea bargaining agreement to plead to the lesser charge of second degree murder. They likewise had believed the case against petitioner to be very strong. (R., Evidentiary Hearing, July 15, 1985, p. 14-15.).

Under the circumstances, the jury could not help but to have understood the nature of petitioner's defense. They were apprised of it during voir dire and counsel's opening statement. The testimony of defense witnesses as to aspects of the theory of defense was simple and direct. Counsel's participation in the entire trial was quite active. See Martin v. McCotter, No. 85-1311, slip. op. 8385-86 (5th Cir. August 13, 1986).

We are convinced that had counsel presented a closing argument, the jury's verdict would not have been different.

j) Counsel Presented An Unprepared Defense During The Penalty Phase Of The Trial

Petitioner complains that counsel did not conduct a proper investigation in connection with the penalty phase of his trial which resulted in the failure to call other witnesses or present mitigating evidence.

With the possible exception of the names of relatives contained in his attorney's affidavit mentioned above, petitioner does not identify these additional witnesses or the substance of their testimony. He does not indicate what additional evidence his sister would have offered.

Petitioner does not furnish us any medical reports connected with his brief stay in a mental hospital some thirteen years prior to the commission of the crime. He does not claim he was treated for or suffered from any mental condition since that earlier hospitalization.

The fact that petitioner had been hospitalized was brought out during the testimony of petitioner's witnesses in the penalty phase of the trial.

Petitioner has not established prejudice in connection with the above issue.

k) Counsel Failed To Object Or Move For A Mistrial During Improper Argument By The Prosecutor During The Penalty Phase Of Trial

Petitioner, in support of the above claim, refers to statements made by the prosecutor which are set out in claims of alleged error in his application for relief, i.e., claims 4 and 5 below.

We find no prejudice to petitioner based upon the above alleged error for reasons that will be obvious when we treat this issue more fully in connection with petitioner's claims 4 and 5 below.

l) Counsel Failed To Object To Erroneous Instructions Given Jury By Court During Guilt And Penalty Phase Of Trial

Petitioner claims that counsel should have objected to the trial court's a) failure to instruct the jury as to how they should treat a defendant's failure to testify; b) instruction on intent; and, c) instruction defining principals.

We will treat below petitioner's complaints as to b and c above, in connection with related issues raised in claims 8 and 9.

As to counsel's failure to object to the court's charge to the jury in that it did not include a charge as to how the jury should treat a defendant's failure to testify on his behalf, Mr. Weidner testified during the state hearing that he purposely requested the court to omit that charge to avoid calling undue attention to the fact that petitioner did not take the stand. (R., Evidentiary Hearing, July 12, 1985, pp. 150-51). Mr. Weidner's decision falls within the definition of trial strategy.

If the particular charge had been included in the court's instructions, the result of the trial would not have been different.

m) Counsel Failed To Make An Effective Closing Argument During The Penalty Phase Of The Trial

Counsel's argument during the penalty phase of the trial is contained in approximately one typewritten page of the trial transcript.

Petitioner complains that the argument was cursory, perfunctory and unpersuasive. We conclude that it was unpersuasive because it was unsuccessful, but lack of success of itself would not result in a conclusion that counsel was ineffective.

The remarks of counsel were of a cursory and perfunctory nature, but petitioner has not established that the jury's recommendation would have been different had counsel dealt longer on mitigating factors favoring him. There was little available by way of mitigation in petitioner's favor.

4. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

Petitioner complains that the prosecutor was guilty of misconduct when he made references to the possibility of a pardon for petitioner if the jury recommended life imprisonment. Additionally, he claims that the assistant district attorney's appeal to a "war on crime", or "community expectation" argument to the jury prejudiced him. The portions of the rebuttal argument to which petitioner objects follows:[6]

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[6] Petitioner also refers us in his petition to the prosecutor's entire closing argument and rebuttal, both in the guilt and

(Continued on following page)

"At that point in time the only thing you will have to worry about is whether or not Robert Sawyer will ever be back on the streets of Jefferson Parish. The man's personality has already been formed. The statute speaks without benefit of probation, suspension, commutation of sentence. The statue (sic) does speak about a pardon. The statute doesn't speak about a commutation so don't think that if you vote for first degree murder, I'm sorry, for life imprisonment that that will be the end of this matter as it relates to Robert Sawyer because it's not. Tr.Tr. 986:14-29.

. . . if the law which we have in this state is to have any piece [sic], if it's to have any meaning, if it's to have any impact on all the other people out on the streets that are committing crimes and murders and rapes and robberies, that is affecting you and me and every member of your family. That has made the good people of this community become prisoners in their own homes in putting bars up in their own homes. They are the ones who are suffering. If the statute is to have any weight behind it at all, my God, ladies and gentlemen this is the time to draw the lines because if a man can commit this type of crime, do this type of thing to this woman in front of two children with a prior conviction for killing a four year old child, then

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(Continued from previous page)

penalty phase of the trial in support of his claim of prosecutorial misconduct without pointing out specific portions of the argument as constituting error. Mere conclusory allegations of error are insufficient to support a claim for relief. See Ross v. Estelle, 694 F.2d 1008 (5th Cir. 1983).

what are the people of this Parish to believe. They are going to believe what a lot of people believe. there is a lot of law and a lot of judges but the judges are letting the criminals out, the law never has any affect. . . . Tr.Tr. 987-17-29; 988:1-6." (R., Petition, p. 17).

The Louisiana Supreme Court discussed in its opinion affirming petitioner's conviction, the prosecutor's reference to the possibility of a pardon, and found petitioner's claim to be without merit.

That Court held:

" . . . There is another factor in this case which we have considered, even though there was no contemporaneous objection, because of the possibility of prejudicial influence on the jury's recommendation of death. State v. Willie, 410 So.2d 1019 (La. 1982). In the final closing argument, the district attorney alluded briefly to the possibility of pardon. In prior cases decided after this trial), we have warned against such an argument, and we have ordered new penalty hearings in cases in which we concluded that the particular argument constituted an improper influence on the jury. See State v. Lindsey, 404 So.2d 466 (La. 1981), and State v. Willie, above. We have never held, however, that an automatic reversal of the death penalty must follow the mere mention of the fact that R.S. 14:30's prohibition against probation or parole for one under sentence of life imprisonment does not exclude executive pardon. Each case must be decided on its own facts and circumstances.

Here, the cryptic and brief comment came in response to the defense attorney's final plea to the jury to spare defendant's life and to sentence

him to the 'living death of life imprisonment', which implied that defendant could never be released. Had the prosecutor done more than make a passing responsive comment on the possibility of a pardon, perhaps a reversal would be warranted. However, the prosecutor did not dwell on the speculative prospect of future action by the executive nor suggest to the jury that the speculative possibility of future release is a valid reason for recommending the death sentence. Thus, in the context of the entire argument, the prosecutor's responsive remark neither deflected the jury's attention from the ultimate significance and finality of the penalty recommendation nor misguided the jury's sentencing discretion by the introduction of inappropriate considerations." [Footnotes ommitted]. State v. Sawyer, supra, 422 So.2d at 104.

We do not disagree with the Supreme Court's conclusion on this issue. Nor do we find merit to petitioner's claim that the prosecutor's use of a "war on crime" argument or his appeal to the jury that the community might not understand a verdict which did not impose the death penalty prejudiced him. See Whittington v. Estelle, 704 F.2d 1418 (5th Cir. 1983), cert. denied, 464 U.S. 983, 104 S.Ct. 428, ___ L.Ed.2d ___ (1983).

A prosecutor is permitted in closing argument to state to the jury what he believes to have been established and to comment fairly on it. Whittington v. Estelle, supra.

Prejudicial comments by a prosecutor in closing argument will justify federal habeas relief only if the error was material in the sense of a crucial, critical and highly significant factor. Washington v. Estelle, 648 F.2d

276 (5th Cir. 1981), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981); Lowery v. Estelle, 696 F.2d 333 (5th Cir. 1983).

A prosecutor's improper argument to the jury

> " . . . [d]oes not present a claim of constitutional magnitude which is cognizable in a proceeding under 28 U.S.C. 2254 unless such argument is so prejudicial that the appellant's state court trial was rendered fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment." Whittington v. Estelle, supra, at 1421.

In viewing the remarks of the prosecutor in the context of the entire trial, which we must, we conclude that the remarks were not so prejudicial as to render the trial fundamentally unfair.

Since petitioner was not prejudiced by the remarks, petitioner is not entitled to relief on his claim of ineffective assistance of counsel presented in claim 3, k above.

5. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

Petitioner additionally complains of the following closing remarks by the prosecution as being prejudicial:

> " . . . you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard

in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. Tr.Tr. 982:6-21.

You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less. Tr.Tr. 984:10-21." (R., Petition, p. 18).

The issue raised by the above quoted argument of the prosecutor is a vague reference to the possible review of the jury's verdict by a higher court.

An argument by a prosecutor, in the penalty phase of a capital case, which suggests to the jury that its responsibility is lessened by appellate review has been condemned in Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

The state prosecutor in the case *sub judice* made another reference to possible review of the jury's verdict by a higher court of which petitioner does not complain.

"It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions. You've done the right thing so far. There can be no doubt that Robert Sawyer committed this crime. The evidence is strong and convincing although he still denies that. He still states he was so intoxicated he doesn't remember anything about this crime. He gave a statement two hours after the crime admitting or at least telling everyone about it. I could have cross examined him and gone more into it and gotten more and more lies but his guilt has already been decided.

I ask that you consider what I have just told you and I may or may not be back to speak to you in a brief rebuttal after Mr. Weidner argues. Thank you." (R., Tr., p. 1519).

Because petitioner did not complain of the comments immediately above, either in his habeas application filed herein or his state habeas proceedings, we cannot consider whether those comments present any grounds for relief.

Although petitioner has not urged error in the prosecutor's comments quoted immediately above, we

should, however, consider the possible effect of those comments on the outcome of the proceedings since we are required to view the comments of which petitioner complains in light of the entire record.

Petitioner's counsel did not object to the prosecutor's comments at the time they were made. The contemporaneous objection rule would not prevent our consideration of the claimed error, as the Louisiana courts themselves in a death case would not be constrained from considering the merits of the issue. State v. Willie, supra.[7]

While the prosecutor's comments in the instant case dangerously approach reversible error, we do not believe it actually reaches that mark.

The remarks herein are distinguishable from the prosecutor's remarks condemned in *Caldwell*. In *Caldwell*, the assistant district attorney made the following argument in response to the defendant advising the jury of their awesome responsibility in imposing the death penalty:

'ASSISTANT DISTRICT ATTORNEY:

Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the

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[7] In fact, in the case *sub judice*, the Louisiana Supreme Court sua sponte noticed a potential problem with the prosecutor's reference to a possible pardon despite the absence of a contemporaneous objection. Sawyer, supra, 422 So.2d at 104. It is perhaps significant that the Louisiana Supreme Court, in fulfilling their duty in death cases to view the record for any apparent error in the record, did not consider apparently that the remarks petitioner complains of above were significantly prejudicial.

defense has taken. I don't think its (sic) fair. I think its (sic) unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know – they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . .

'COUNSEL FOR DEFENDANT:

Your Honor, I'm going to object to this statement. It's out of order.

'ASSISTANT DISTRICT ATTORNEY:

Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

'THE COURT:

Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

'ASSISTANT DISTRICT ATTORNEY:

Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shall not kill." If that applies to him it applies to you, insinuating that decision is the final decision and that they're gonna to take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I

> think its (sic) unfair and I don't mind telling them so.' Caldwell v. Mississippi, supra, at 2637-38.

A consideration by the *Caldwell* court was that the prosecutor's remarks in that case were "focused, unambiguous and strong" and because the trial judge, not only failed to give a curative instruction, but openly approved the prosecutor's remarks. Caldwell v. Mississippi, supra, at 2645.

The comments complained of herein were ambiguous and not merely as strong as the comments in *Caldwell*. The court's instructions to the jury in the case herein did not lend support to the prosecutor's statements concerning appellate review. To the contrary, the trial court, after meticulously instructing the jurors on the factors they were to consider in their deliberations, concluded with the injunction, that *"[I]t is your responsibility* in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or to life imprisonment." [Emphasis added]. (R., Tr., p. 1527).

The prosecutor's remarks complained of herein, while suggesting possible appellate review, were not sufficient to form a conclusion that the jury's responsibility was lessened by appellate review. The prosecutor told the jury in effect that you [the jury] by recommending the death penalty will be telling any court that reviews this case that " . . . [t]his man from his actions could be prosecuted to the fullest extent of the law". (R., Tr., p. 1518).

Reference to possible appellate review should not result, in all cases, in an automatic reversal of a death penalty.

As observed in State v. Mattheson, 407 So.2d 1150, 1165 (La. 1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983); quoting State v. Berry, 391 So.2d 406 (La. 1980), cert. denied, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981) " . . . virtually every person of age eligible for jury service knows that death penalties are reviewed on appeal. There is no absolute prohibition against references to this fact of common knowledge, and the court should not impose an absolute prohibition, since such a reference does not necessarily serve to induce a juror to disregard his responsibility". See also Moore v. Maggio, 740 F.2d 308, 320 (5th Cir. 1984); on subsequent application for habeas relief, 774 F.2d 97, 98 (5th Cir. 1985).

Although *Mattheson* was decided prior to *Caldwell*, its rationale appears to comport with the holding in *Caldwell*.

Even considering the prosecutor's remarks in connection with the comments appearing on page 1519 of the trial transcript, petitioner was not prejudiced. Those later comments, although "hinting" that an appellate court might have the final decision on the imposition of the death penalty, the comments are ambigious at best.

The prosecutor told the jury:

> " . . . [a]nd if you are wrong in your decision, believe me, believe me there will be others who will be behind you *to either agree with you or to say you are wrong so I ask that you do have the*

courage of your convictions." (R., Tr., p. 1519). [Emphasis added].

The above quote, when viewed as a whole, would not necessarily suggest to the jury that its responsibility is lessened, considering the prosecutor's statement to the jury to " . . . have the courage of your convictions".

The standard to be employed in determining whether prejudice resulted from alleged improper remarks by the prosecutor, condemned in *Caldwell*, is the "reasonable probability" test for determining prejudice established by Strickland v. Washington, supra. See Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) en banc; Bowen v. Kemp, 769 F.2d 672 (11th Cir. 1985), rehearing denied, 776 F.2d 1486 (commenting that there is no incompatibility between the standard enunciated in *Caldwell* and that established in *Strickland*), rehearing en banc denied, 778 F.2d 623 (11th Cir. 1985).

The defendant must show under the appropriate standard, " . . . that there is a reasonable probability that, but for counsel's [prosecutor's] unprofessional errors, the result of the proceeding would have been different: a reasonable probability is a probability sufficient to undermine confidence in the outcome". Strickland v. Washington, supra, 104 S.Ct. at 2068.

In the instant case, the jury found two aggravating circumstances to support its recommendation of the imposition of the death penalty, when only a finding of one would have been sufficient. The evidence of defendant's guilt was ample. There was little in the way of mitigating evidence. The court's instructions properly

directed the jury's attention to those factors it was to consider in arriving at a recommendation.

The Louisiana Supreme Court, upon review of the record on appeal, determined:

> "We are convinced . . . that the jury's recommendation was not reached arbitrarily and was not based on improper considerations, and we have been shown no basis for overturning the recommendation on appeal." State v. Sawyer, supra, 422 So.2d at 106.

The court's finding is entitled to great weight. Wingo v. Blackburn, supra.

We conclude, based on the above considerations, that there is no reasonable probability, that but for the prosecutor's alleged professional errors, the recommendation of the jury would have been different.

For these same reasons, we conclude that petitioner has failed to establish prejudice on the claim of ineffective assistance of counsel raised in ground 3, k above.

6. FAILURE TO ALLOW PETITIONER THE RIGHT TO MAKE DECISION AS TO WHETHER HE WOULD TESTIFY ON HIS OWN BEHALF

Petitioner complains that his attorney made the decision on his own as to whether or not petitioner would testify during the guilt phase of the trial without advising him that he had a right to make that decision himself.

A related issue involving a claim of ineffective assistance of counsel has been disposed of above.

Petitioner does not claim that he ever made a request of his counsel to be allowed to testify. Petitioner does not indicate what his testimony would have been had he made the decision to testify. Petitioner has not established that he was prejudiced by the alleged error.

7. TRIAL COURT'S FAILURE TO INSTRUCT THE JURY AS TO HOW THEY SHOULD TREAT A DEFENDANT'S FAILURE TO TESTIFY

Petitioner claims that he was prejudiced by the trial court's failure to include an instruction to the jury that a defendant is not required to testify and that no presumption of guilt may be drawn from the fact that a defendant does not testify.

The record reflects that the state judge's instructions to the jury did not contain such a charge.

Mr. Weidner testified at the evidentiary hearing that he requested the trial judge not to include the above charge in the court's instructions as a strategy move to avoid undue attention being drawn to the fact that defendant did not take the stand in his defense.

No error was committed by the court for failing to include the charge since it was purposefully omitted at the request of defense counsel.

We have already disposed of petitioner's allegations that counsel's request to the court to omit the charge constituted ineffective assistance of counsel.

8. TRIAL COURT'S INSTRUCTION IMPROPERLY RELIEVED STATE OF BURDEN OF PROOF

Petitioner complains that the following instruction given the jury by the trial court had the effect of relieving the state from its burden of proving "specific intent" an element of the crime.

> "A specific intent to kill may be implied where there are no external signs of the intent beyond the mere facts of the homicide itself, if there were no just grounds for the killing, when the killing was without provocation or upon so slight a provocation as not to justify the killing. Tr.T. 926:19-24." [R., Tr., p. 1481).

For a trial error to be reviewable in Louisiana, an objection must be made at the time of its occurrence. LSA Louisiana Code of Criminal Procedure Art. 841. Absent cause for the procedural default and actual prejudice from the error, principles of comity and federalism prevent federal courts from granting habeas corpus relief to a state prisoner whose claim would not be reviewable in the state court because of the default. Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Petitioner does not allege cause for the failure to object to the charge. A claim that the "cause" was due to counsel's ineffectiveness is not sufficient to establish cause. Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981). See Weaver v. McKaskle, 733 F.2d 1103 (5th Cir. 1984); Stokes v. Procunier, 744 F.2d 475 (5th Cir. 1984).

Even if cause existed for failure to object to the charge, petitioner would not be entitled to relief on the

above claim. The complained of charge quoted above is only a small part of the entire instruction given the jury on "specific intent". The quote is taken out of context. A review of the court's entire charge on that element of the offense reveals that the jury was instructed how they *may* treat various factual circumstances [including the one petitioner complained of] in order to determine whether a defendant had specific intent to kill someone. [Emphasis added]. The court concluded by telling the jury: "Therefore you should determine whether or not there was criminal intent by considering all of the facts and circumstances of this case". (R., Tr., p. 1482).

Because we would determine the charge complained of to have been proper, petitioner's companion claim that counsel's failure to object to the charge constituted ineffective assistance of counsel is without merit.

9. TRIAL COURT'S INSTRUCTION IMPROPERLY RELIEVED STATE OF BURDEN OF PROOF

Petitioner complains that the following charge on the law of principals improperly relieved the state of its burden to prove specific intent.

> "All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission or directly or indirectly counsel or procure another to commit the crime are principals.
>
> In order words, to be concerned in the commission of a crime, it must be shown that the person or persons charged did something knowingly and intentionally in furtherance of the common design, or to put it another way, that he or they aided, abetted and assisted in the perpetration of the offense.
>
> All persons knowing the unlawful intent of the person committing the crime, who were present, consenting thereto, and aiding and abetting either by furnishing the weapons of attack, encouraging by words or gestures, or endeavoring at the time of the commission of the offense, to secure the safety or concealment of the offender, are principals and equal offenders and subject to the same punishment. (T.T. 931:5-24)." [R., Tr., p. 1466].

No contemporaneous objection was made in connection with the above charge to the jury and there is no objection of cause for the failure to object to the charge. This claim as well as petitioner's companion claim of counsel's failure to object to the above charge is without merit.[8]

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[8] Petitioner would not succeed on the merits of this claim. Petitioner argues in his brief that the above instruction might have caused the jury to have found him guilty if they believed that he failed to prevent Lane from beating the victim. Petitioner fails to include the trial court's complete charge on principals which include an instruction that a person cannot be considered a principal under the circumstances suggested by petitioner. (R., Tr., p. 1467). Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982), reh'g denied, 697 F.2d 699 (1983) cited by petitioner in support of his claim involved a conspiracy instruction and its holding is inapposit [sic] to the conclusion we reach herein. In the instruction given herein, the court charged the jury that a principal is one who " . . . [k]nowing the unlawful intent of the person committing the

(Continued on following page)

10. TRIAL COURT ERRED IN EXCUSING A JUROR WHO EXPRESSED ONLY A GENERAL OPPOSITION TO THE DEATH PENALTY

Petitioner complains that the court excused a prospective juror after she expressed only a general opposition to the imposition of the death penalty.

The juror, Gwendolyn Lee, when asked her feelings toward the death penalty, replied:

> "What are your feelings about capital punishment?
>
> A. I don't agree with it.
>
> Q. You say you don't agree with it. That is regardless of what the evidence may show, no matter how heinous of a crime, you are telling me you are morally or religiously, no matter what the evidence may show you could not even consider the imposition of the death penalty?
>
> A. No I don't think it is fair.

(Continued from previous page)

crime . . . , [and] . . . consenting thereto. . . . " aids and abets in the commission of the crime. (R., Tr., p. 1466). The prosecutor referred to the law or principals in his closing argument. (R., Tr., p. 1444). However, it was in reference to petitioner being a principal in the aggravated rape of Ms. Arwood. The argument was harmless, since the jury did not find the aggravated rape to have been an aggravating circumstance after the penalty hearing. The evidence at trial established that petitioner did not participate in the crime merely as an aider and abetter. He himself beat the victim, caused her to become unconscious when he kicked her into the bathtub, poured the lighter fluid on her and lit her on fire.

> Q. You don't think it's fair. You have had this belief for quite some time?
>
> A. Yes.
>
> Q. Is this a religious belief, is the death penalty contrary to your religion?
>
> A. Yes.
>
> Q. You have strong contrary objections to it no matter what the evidence may show.
>
> A. That is right.
>
> THE COURT:
>
> Let me explain this to you, Mrs. Lee. We do have a death penalty in Louisiana. That doesn't mean it would be imposed in this case or any other case. What Mr. Weidner is asking you if the facts of this case indicate that the death penalty should be imposed, could you vote for it under those circumstances?
>
> MRS. LEE:
>
> I really don't think I could.
>
> THE COURT:
>
> You don't think you could?
>
> MRS. LEE:
>
> No." (R., Tr., pp. 811-813).

The inquiry that we must make to determine if a juror may be excluded for his or her views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Wicker v. McCotter, 783 F.2d 487 (5th Cir. 1986).

This test is to be applied primarily by the trial judge and his determination that a juror should be excused because of his or her views on capital punishment is accorded a presumption of correctness under 28 U.S.C. § 2254(d). Wicker v. McCotter, supra, at 493.

There is support for the trial court's determination that Mrs. Lee's views on capital punishment might substantially impair her performance as a juror.

11. VIOLATION OF PETITIONER'S RIGHTS UNDER EIGHTH AND FOURTEENTH AMENDMENT WHEN ONE OF AGGRAVATING CIRCUMSTANCES NOT SUPPORTED BY EVIDENCE

The issue petitioner raises under this claim is essentially a complaint that he was prejudiced in the penalty phase of his trial by the introduction of a crime, the involuntary manslaughter of a child, which was unrelated to any aggravating circumstances upon which the jury could find in imposing the death penalty.[9]

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[9] It is unclear from the petition filed by petitioner whether he is also complaining that evidentiary support for all of the aggravating circumstances found by the jury was required. This issue, if raised, is without merit. This issue was treated fully in petitioner's direct appeal. The Louisiana Supreme Court held that an " . . . [a]dequately supported finding of the existence of one aggravating circumstance is alone sufficient to place defendant in that category of offenses properly exposed

(Continued on following page)

Although petitioner does not articulate the constitutinal [sic] error present in this claim, it would appear that he is complaining of the same error that was raised in his direct appeal and on which the United States Supreme Court remanded to the Louisiana Supreme Court for further consideration in light of the former Court's holding in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Sawyer v. Louisiana, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983).

The court in *Zant* held *inter alia* that a death sentence based upon two or more statutory qualifying grounds, one of which was later determined to be invalid, would not automatically require reversal of the death penalty unless it was determined that the deficient ground was invalidated on the basis it involved constitutionally protected activity, or the penalty was arbitrary and capricious because the invalidated ground involved the introduction of evidence not otherwise admissible.

On remand, the Louisiana Supreme Court held that the holding in *Zant* did not preclude the affirmance of the imposition of the death penalty in petitioner's case since the evidence of the manslaughter conviction, even if erroneously admitted to support one of the aggravating circumstances, was properly admitted to shed light on petitioner's character. Sawyer v. Louisiana, 442 So.2d 1136 at 1139-40.

(Continued from previous page)

to the possibility of the death sentence. See Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc)." State v. Sawyer, 422 So.2d at 101-102.

A defendant's character constitues valid considerations by the jury during the penalty phase of the trial. LSA Louisiana Code of Criminal Procedure Art. 905.2.

Petitioner's application for writ of certiorari to the United States Supreme Court from the decision of the state court after remand was denied. Sawyer v. Louisiana, ___ U.S. ___, 104 S.Ct. 1719, ___ L.Ed.2d ___ (1983).

Petitioner does not raise a constitutional question under the present claim as the evidence of manslaughter conviction was properly admissible under Louisiana law to establish petitioner's character, an important and relevant issue during the penalty phase of the trial.

12. INADMISSIBLE EVIDENCE WAS INTRODUCED DURING PENALTY PHASE OF TRIAL

Petitioner next complains about the prosecutor's reference during the penalty phase of the trial to the hearsay statements of uncalled witnesses, that the child, who was the victim of the Arkansas manslaughter conviction, was the victim of prior physical abuse at the hands of petitioner.

Petitioner refers in his petition to the following statements of the prosecutor as objectionable:

> "If I were to tell you that I have in my custody the District Attorney's file from Arkansas relating to that conviction where Robert committed a homicide of a four year old girl and if I told you in this file I have statements of six people that Laura Durham, a four year old child, was an abused child, that (sic) constantly beaten by

> your brother, would you believe those six people? (See T.T. p. 961)." (R., Tr., p. 1496).
>
> "I will read to you a hospital report in reference to little Laurie. Four year old white female, Miss Laura Sawyer arrived at the emergency room on December 4, 1973 at 1:44 p.m. She was brought to the emergency room by Robert Sawyer. The emergency room recorded her address as such and such. . . . " See T.T. 961-962. (R., Tr., p. 1496-97).

Petitioner goes on to complain that subsequent to the second statement quoted above, the prosecutor elicited testimony from the state's witness about information that the child was the victim of prior abuse, which information was contained in the hospital report prepared on the date the child was admitted with her fatal injury.

The prosecutor apparently used this material in an attempt to counteract the favorable testimony of petitioner's sister that he took good care of the child.

Petitioner admitted in his testimony during the penalty phase of the trial that the child did have bruises on her body the day she was brought to the hospital. He denied that the prior injuries were caused by him, but laid the blame on the child's mother.

Petitioner did not object at trial to the testimony of which he now complains herein. The contemporaneous objection rule is not an issue in considering this claim, however, since the state has not raised the rule in connection with this claim in its response to the petition. See Miller v. Estelle, 677 F.2d 1080 (5th Cir. 1982), cert. denied, 459 U.S. 1072, 103 S.Ct. 494, 74 L.Ed.2d 636 (1982).

Hearsay testimony, with certain limited exceptions, is generally inadmissible. We can only conclude, without any suggestion to the contrary by the respondent, that the statements and testimony complained of herein were inadmissible.

The admission of the testimony complained of above must have resulted in a denial of fundamental fairness to entitle him to habeas corpus relief in this Court. Scott v. Maggio, 695 F.2d 916 (5th Cir. 1983).

> " . . . [t]he mere erroneous admission of prejudicial testimony does not in itself, justify federal habeas relief unless it is 'material in the sense of a crucial, critical, highly significant factor,' in the context of the entire trial." Menzies v. Procunier, 743 F.2d 281, 288 (5th Cir. 1984) quoting Porter v. Estelle, 709 F.2d 944, 957 (5th Cir. 1983).

Petitioner admitted that he had spanked the child with a belt on several occasions prior to her death. Any reference by the prosecutor, in light of that admission, that he had statements from six people that petitioner constantly beat the child was harmless.

Petitioner has failed to demonstrate fundamental fairness.

Petitioner additionally complains about the use, during his cross-examination, of a prior statement he gave in connection with the Arkansas case. He claims that the prosecutor introduced the statement without first establishing at trial that the statement was voluntary.

Petitioner failed to establish prejudice. The burden of proof in an habeas application is upon the habeas petitioner. Walker v. Maggio, 738 F.2d 714 (5th Cir. 1984), cert.

denied, ___ U.S. ___, 105 S.Ct. 793, ___ L.Ed.2d ___ (1985); Hayes v. Maggio, 699 F.2d 198 (5th Cir. 1983). Petitioner has set forth no facts which would suggest that the prior statement was not voluntary.

13. PETITIONER'S SENTENCE IS EXCESSIVE AND DISPROPORTIONATE

14. PETITIONER'S SENTENCE IS ARBITRARY AND CAPRICIOUS

15. ELECTROCUTION IS A CRUEL AND UNUSUAL MEANS OF PUNISHMENT

16. PETITIONER'S SENTENCE IS INVIDIOUSLY DISCRIMINATORY

17. CAPITAL PUNISHMENT IS AN EXCESSIVE PENALTY

18. THE CUMULATIVE EFFECT OF VIOLATIONS OF PETITIONER'S RIGHTS IS IN ITSELF A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS

The grounds for relief raised in the above six claims are conclusory in nature. Petitioner offers no support in fact or law to justify their consideration.

RECOMMENDATION

It is recommended that the application for writ of habeas corpus filed on behalf of petitioner, Robert Sawyer, be DENIED and that the stay of execution be VACATED.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, this 8 day of September, 1986.

/s/ Ronald A. Fonseca
RONALD A. FONSECA
United States Magistrate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROBERT SAWYER	CIVIL ACTION
VERSUS	NUMBER: 86-223
FRANK BLACKBURN, WARDEN	SECTION: "I" (4)

ORDER

The Court, after considering the petition, the record, the law applicable to the case, and the Magistrate's Finding and Recommendation, hereby approves the Magistrate's Finding and Recommendation and adopts it as its opinion, with the comments and corrections noted herein.

In view of the serious nature of the petitioner's allegations pertaining to the trial court's appointment of counsel with less than five years experience in violation of Article 512 of the Louisiana Code of Criminal Procedure, the Court makes the following additional comments:

The petitioner contends that the trial court's noncompliance with Article 512 of the Louisiana Code of Criminal Procedure deprived him of equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution. We find it unnecessary to reach the merits of the petitioner's equal protection and due process claims, because even if the trial court's appointment of counsel with less than five years experience violated the petitioner's Fourteenth Amendment rights, the record reveals that the error was harmless beyond a reasonable doubt. Because we assume for argument's sake that an error was committed, we

must now engage in a two-part analysis: (1) Can this type of error ever be treated as harmless, and (2) if so, was the violation harmless in this case.

Discussing the purpose and the application of the federal harmless error rule, the United States Supreme Court in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), noted: "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman* 386 U.S. at 23. The *Chapman* court gave examples of such "basic" constitutional rights: the right to counsel, *Gideon v. Wainwright*, 372 U.S. 355, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); the right to be tried by an impartial judge, *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); and the right to have coerced confessions deemed inadmissible at trial, *Payne v. Arkansas*, 356 U.S. 560 78 S.Ct. 844, 2 L.Ed.2d 975 (1958). By contrast, there are other constitutional errors "which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless. . . ." *Chapman*, U.S. at 22.

The petitioner contends that the trial court's appointment of counsel with less than five years experience violated one of his "basic" constitutional rights therefore making a harmless error inquiry improper. Furthermore, the petitioner asserts that the harmless error principle can *never* be applied to due process of equal protection claims. We find no merit in petitioner's arguments. A due process or equal protection error, like most other constitutional errors, can be held harmless. *See Cancler v. Maggio*, 550 F.2d 1034 (5th Cir. 1977); *Hills v. Henderson*, 529 F.2d 397, 401-02 n.8 (5th Cir. 1976). The only time a

harmless error inquiry is not appropriate is when the constitutional right violated is included in *Chapman's* "so basic to a fair trial" category. Any right to five-year counsel in a capital case is not included in this category.

Our next inquiry is whether the trial court's appointment of counsel with less than five years experience constitutes harmless error in this case. The *Chapman* court pronounced that an error is not harmless where there is a "reasonable possibility" that the error complained of "might have contributed to the conviction". *Chapman*, 386 U.S. at 23 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963)). The Court placed the burden upon the state to prove that the error was harmless. *Chapman*, 386 U.S. at 24. Although the Supreme Court continues to rely upon *Chapman* in its harmless error decisions, the Court has shifted its inquiry from whether the error "might have contributed to the conviction" to whether there was overwhelming independent evidence of guilt. Under the revised test, an error is harmless where, absent the error, the evidence was so overwhelming as to establish the guilt of the accused beyond a reasonable doubt. *United States v. Hasting*, 461 U.S. 499, 512, 103 S.Ct. 1974, 1982, 76 L.Ed.2d 96, 108 (1983); *Brown v. United States*, 411 U.S. 223, 230-32, 93 S.Ct. 1565, 1569-70, 36 L.Ed.2d 208, 215 (1973); *Milton v. Wainwright*, 407 U.S. 371, 377, 78, 92 S.Ct. 2174, 2177-78, 33 L.Ed.2d 1, 6-7 (1972); *Harrington v. California*, 395 U.S. 250, 254,89 S.Ct. 1726, 1728, 23 L.Ed.2d 284, 288 (1969). This overwhelming independent evidence test is consistent with the purpose of the harmless error rule as stated in *Chapman* – to "block setting aside convictions for small errors or defects that have little, if any, likelihood of

having changed the result of the trial." 386 U.S. at 22. Moreover, the United States Fifth Circuit has recognized the overwhelming independent evidence test as the proper harmless error standard. *Germany v. Estelle*, 639 F.2d 1301 (1981), *Harryman v. Estelle*, 616 F.2d 870 (1980).

After examining the record, and the effect of the trial court's noncompliance with Article 512 in this particular case, we conclude that ny [sic] error committed by the trial court in not appointing five-year counsel was harmless beyond a reasonable doubt.

In light of the recent United States Supreme Court ruling in *Lockhart v. McCree*, 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) which addressed the same issue as that raised by Mr. Sawyer in ground ten of his application for habeas corpus relief, we find it necessary to comment upon the effect of that decision in the case at hand.

The petitioner has alleged that the state trial court's removal of a juror who expressed opposition to the death penalty deprived him of the right to have his guilt or innocence determined by a jury composed of a representative cross section of the community as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution. In January of 1986, this Court stayed the execution of the petitioner pending a ruling on the same issue by the United States Supreme Court in *Lockhart v. McCree*. The supreme Court rendered its decision on May 5, 1986. The *Lockhart* court held that the removal of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors does not violate

the requirement that a jury must represent a fair cross section of the community.

After carefully reviewing the record and transcript in this case, we conclude that the petitioner's claim is without merit. The record supports the state trial court's determination th : the juror's opposition to the death penalty would have prevented her from properly and impartially applying the law to the facts, thereby substantially impairing the performance of her duties as juror.

The Court makes the following corrections to the Magistrate's Finding and Recommendation:

Page 1, lines 15-16: the citation should read *"Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)".

Page 6, lines 18: "even" should read "ever".

Page 7, line 31: "grounds" should read "ground".

Page 11, footnote 4, line 4: The citation should read: *"Coco v. Winston Industries, Inc.*, 341 So.2d 332, 335 n.1 (La.1976)".

Page 14, line 5: the citation should read "McCrae v. Blackburn, 793 F.2d 684, 688 (5th Cir. 1986)".

Page 14, line 6: "more" should read "less".

Page 24, line 9: "of itself" should read "in itself".

Page 30, line 18: "[d]oes" should read "does".

Page 30, line 20: the citation should read "28 U.S.C. §2254".

Page 34, line 37: "merely" should read "nearly".

Page 35, line 25: "the" should read "this".

Page 37, line 24: "the" should read "that".

Page 39, line 15: a comma should follow "specific intent".

Page 42, footnote 8 line 10: "inapposit" should read "inapposite".

Page 44, lines 15-16: the citation should read "*Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)".

Page 45, line 9: "constitutinal" should read "constitutional".

Page 45, footnote 9, line 6: "[a]dequately" should read "adequately".

Page 45, footnote 9 line 8: "offenses" should read "offenders".

Page 46, line 14: the citation should read "*Sawyer v. State*, 442 So.2d 1136 at 1139-40".

Page 49, line 5: "[t]he" should read "the".

Accordingly,

IT IS ORDERED that the application filed on behalf of petitioner, Robert Sawyer, is hereby DENIED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ROBERT SAWYER.	CIVIL ACTION
VERSUS	NUMBER: 86-223
FRANK BLACKBURN, WARDEN	SECTION: "I" (4)

JUDGMENT

For the reasons of the Court on file herein, accordingly:

IT IS ORDERED, ADJUDGED, and DECREED that there be judgment in favor of the defendant, Frank Blackburn, Warden, and against the petitioner, Robert Sawyer, dismissing the petitioner's application for a writ of habeas corpus.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the stay of execution entered by this Court on January 21, 1986 be and is hereby RESCINDED.

New Orleans, Louisiana, this 8th day of April, 1987.

/s/ (illegible)
UNITED STATES
DISTRICT JUDGE

IT IS FURTHER ORDERED that the stay of execution entered by this Court on January 21, 1986 is hereby RESCINDED.

New Orleans, Louisiana, this 8th day of April, 1987.

/s/ (illegible)
UNITED STATES
DISTRICT JUDGE

Robert SAWYER, Petitioner-Appellant,

v.

Robert H. BUTLER, Sr., Warden, Louisiana State Penitentiary, Respondent-Appellee.

No. 87-3274.

United States Court of Appeals, Fifth Circuit.

June 30, 1988.

Petitioner appealed denial by the United States District Court for the Eastern District of Louisiana, at New Orleans, Henry A. Mentz, Jr., J., his petition for writ of habeas corpus. The Court of Appeals, King, Circuit Judge, held that: (1) petitioner was not denied effective assistance of counsel; (2) error in violation of Louisiana statute requiring that appointed counsel in capital case have five years' experience was harmless; and, the Court Per Curiam, held that: (3) remarks by prosecutor in closing argument at punishment stage of capital trial did not mislead jury by inducing it to feel less responsible than it should for sentencing decision.

Affirmed.

King, Circuit Judge, filed opinion dissenting in part.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, KING and DAVIS, Circuit Judges.

KING, Circuit Judge:

Robert Sawyer appeals from the district court's denial of his petition for writ of habeas corpus, and its concomitant entry of an order rescinding Sawyer's stay of execution. On appeal, Sawyer argues that his conviction for first degree murder should be reversed both because he was denied effective assistance of counsel and because the state trial court, be failing to comply with a state law requiring that counsel assigned in a capital case must have been admitted to the bar for at least five years, violated Sawyer's constitutional due process and equal protection rights. In addition, Sawyer argues that the prosecutor's closing argument in the sentencing phase of his trial violated the eighth amendment by erroneously misleading the jurors concerning their role as the final arbiters of death. As we agree with the district court that Sawyer's challenges to his conviction and sentence do not warrant habeas relief, we affirm the district court's judgment.

I.

Robert Sawyer ("Sawyer") is a state prisoner currently incarcerated at the Louisiana State Penitentiary in Angola, Louisiana. Sawyer and Charles Lane ("Lane") were charged with first degree murder for the gruesome slaying of Frances Arwood.[1] Both were ultimately tried

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[1] The district court adopted the following statement of facts as set forth in the opinion of the Supreme Court of Louisiana in Sawyer's case:

> A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood

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separately. Sawyer was represented at trial by his court-appointed attorney, James Weidner ("Weidner"). Sawyer

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was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained

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was originally represented by Wiley Beevers ("Beevers"). It was Beevers who had initially brought Weidner into the

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reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or even revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

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case by asking him to assist as co-counsel. Beevers subsequently withdrew from the case when Sawyer refused to accept a plea bargain offered by the prosecutor and Weidner was left as sole counsel. Upon receiving his appointment, Weidner informed the trial court that he was not a "death-qualified" attorney because he lacked five years experience as required for appointed counsel in capital cases by article 512 of the Louisiana Code of Criminal Procedure.[2] The trial court told Weidner to get

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Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("they've killed Fran and they're trying to kill me.") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also say defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. Then the authorities arrived, they took Lane and Defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died.

State v. Sawyer, 422 So.2d at 97-98.

[2] Article 512 provides, in pertinent part:

When a defendant charged with a capital offense appears for arraignment without counsel, the court

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an experienced counsel to "sit" with him. Weidner managed to secure some assistance from several other attorneys, but no "death qualified" attorney was ever appointed as co-counsel. Neither party disputes the fact that the terms of article 512 were not complied with. Sawyer was convicted of first degree murder and sentenced to death by a jury on September 19, 1980.

His conviction and sentence were affirmed by the Louisiana Supreme Court. *See State v. Sawyer*, 422 So.3d 95 (La. 1982). Sawyer's petition for a writ of certiorari to the United States Supreme Court was granted and the case was remanded with instructions for the Louisiana Supreme Court to reconsider its ruling in light of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *See Sawyer v. Louisiana*, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). On remand, the Louisiana Supreme Court again affirmed the death sentence, *see Sawyer, v. Louisiana*, 442 So.2d 1136 (La. 1983), and Sawyer's subsequent petition for writ of certiorari was denied, *see Sawyer v. Louisiana*, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). At this point, Sawyer sought state habeas relief which was ultimately unsuccessful. *See Sawyer v. Maggio*, 479 So.2d 360 (La.1985); *Sawyer v. Maggio*, 480 So.2d 393 (La.1985).

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shall assign counsel for his defense. Such counsel may be assigned earlier, but mut be assigned before the defendant pleads to the indictment. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel.

Having exhausted his state remedies, Sawyer filed a federal habeas petition in the United States District Court for the Eastern District of Louisiana. In his petition, Sawyer argued, among other things, that he received ineffective assistance of counsel, and that the state trial court's failure to comply with article 512 violated his due process and equal protection rights. Moreover, Sawyer claimed that the prosecutor's closing argument in the sentencing phase of his trial erroneously misled the jury as to their role as the final arbiters of death and, therefore, violated the eighth amendment. After granting Sawyer a stay of execution, the district court assigned Sawyer's case to a magistrate for a hearing. On September 9, 1986, the magistrate submitted his proposed findings and recommended to the district court that Sawyer's petition be denied and the stay of execution be vacated. With respect to Sawyer's ineffective assistance of counsel claim, the magistrate concluded that Sawyer had failed to demonstrate that he was prejudiced by any of Weidner's allegedly deficient actions as counsel. As to the state trial court's non-compliance with article 512, the magistrate began by noting that the state trial judge, after the evidentiary hearing, concluded that the violation is not fatal to a capital conviction when the defendant actually received effective assistance of counsel. The magistrate, therefore, refused to reach the issue of whether Sawyer's due process and equal protection rights were actually violated "since any alleged breach of those rights was harmless beyond a reasonable doubt and, consequently, does not raise a federal constitutional question. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705

(1967)." Finally, the magistrate concluded that the prosecutor's remarks in his closing argument during the penalty phase were distinguishable from those condemned in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), as violative of the eighth amendment. Moreover, after concluding that "[r]eference to possible appellate review should not result, in all cases, in an automatic reversal of a death penalty," the magistrate went on to conclude that since "there is no reasonable probability, that but for the prosecutor's alleged professional errors, the recommendation of the jury would have been different, "resentencing would be inappropriate.

On April 8, 1987, the district court issued its ruling adopting the magistrate's findings and recommendations in an order incorporating several amendments to the magistrate's opinion.[3] The district court also examined, in greater detail, the question of whether *Chapman's* harmless error analysis applies to the alleged constitutional violations in the instant case. The district court concluded that a *Chapman* analysis was appropriate since the state trial court's failure to appoint counsel with five years experience could not be classified as a violation of constitutional rights "so basic to a fair trial" as to preclude the harmless error inquiry. The district court found no merit in Sawyer's assertion that harmless error analysis can never be applied to due process or equal protection

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[3] For the balance of this opinion, we will refer to the magistrate's findings and recommendations, as corrected by the district court, and the district court's additions to the magistrate's report collectively as the district court's conclusions.

errors. Finally, the district court found that the state trial court's appointment of counsel with less than five years experience in the instant case was indeed harmless since the evidence against Sawyer was so overwhelming as to establish his guilt beyond a reasonable doubt. Sawyer filed timely notice of appeal and was granted a certificate of probable cause to appeal and a stay of execution pending appeal. We have jurisdiction under Title 28, United States Code, section 2253.

II.

On appeal, Sawyer raises three challenges to his confinement and sentence. First, Sawyer argues that he was accorded ineffective assistance by his "inexperienced appointed counsel, who was no lawfully qualified to represent a capital defendant," in violation of the sixth amendment. Next, Sawyer argues that the state trial court's failure to comply with article 512 violated Sawyer's constitutional due process and equal protection rights. He contends that the district court erred in applying a harmless error analysis to his claims for they are related to the integrity of the trial process itself and, as such, are not proper subjects for a *Chapman* inquiry. Finally, Sawyer contends that certain improper remarks by the prosecutor in closing arguments at the sentencing phase of Sawyer's trial erroneously misled the jury as to their role in the death penalty determination and, therefore, violated the eighth amendment as interpreted in *Caldwell*. Sawyer also takes issue with the district court's imposition of a prejudice requirement on his *Caldwell*

violation claims. We will consider each of these arguments in turn.[4]

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[4] Sawyer also argues briefly that since the jury was allowed to weigh an aggravating circumstance that was later held to have been improperly submitted, his death sentence was imposed in violation of the eighth amendment. Specifically, the jury found that Sawyer had previously been convicted of an unrelated murder because he was indicted in Arkansas for second degree murder in the killing of a child, and pled guilty to involuntary manslaughter for that crime. The Louisiana Supreme Court, however, ruled that a conviction for involuntary manslaughter could not support a finding that Sawyer had previously been convicted of an unrelated murder. *Sawyer*, 422 So.2d at 101. The Louisiana Supreme Court concluded that the evidence of Sawyer's prior conviction was properly admitted, however, and did not inject an arbitrary factor into the sentencing proceeding. *Id.* at 104. Sawyer's argument to the contrary is of no moment. As we have stated:

> The fact that an invalid statutory aggravating circumstance has been found does not constitutionally impair a death sentence under the Louisiana procedure where the jury has also found another aggravating circumstance which is supported by the evidence and is valid under the law and of itself suffices to authorize the imposition of the death penalty.

James v. Butler, 827 F.2d 1006, 1013 (5th Cir.1987); *see also Byrne v. Butler*, 845 F.2d 501, 501,514-15 (5th Cir. 1988).

Sawyer does not dispute that the jury properly found two other aggravating circumstances, namely that the crime was committed in a particularly heinous manner and that it occurred during the perpetration of arson. The Louisiana Supreme Court concluded that the evidence was clearly sufficient to support the jury's findings with respect to those aggravating circumstances, *Sawyer*, 422 So.2d at 101, and "[t]hat

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III.

A. Ineffective Assistance of Counsel

Sawyer points to a number of alleged deficiencies in Weidner's performance at trial as support for his allegation of ineffective assistance of counsel. Specifically, Sawyer notes that Weidner: (1) failed to ask the jurors about their attitudes towards the death penalty during voir dire; (2) objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well as the penalty for manslaughter at the guilt phase; (3) failed to object to several inadmissible, inflammatory remarks by the prosecutor; (4) produced no defense experts on the subjects of intoxication and toxic psychosis even though he had chosen them as his chief defenses to negate the specific intent required for first degree murder; (5) failed to make a closing argument at the guilt phase of trial; and (6) failed to prepare a competent penalty phase presentation.

Sawyer's claims of ineffective assistance of counsel must be evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct.

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court's determination is entitled to great weight in our review," *Wingo v. Blackburn*, 786 F.2d 654, 655 (5th Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1984, 95 L.Ed.2d 823 (1987). In fact, Sawyer does not argue that the evidence was insufficient to support the other aggravating circumstances. Those aggravating circumstances were sufficient to authorize the imposition of the death penalty and Sawyer has not challenged their legal validity in this case. Sawyer's sentence, therefore, was not constitutionally impaired by the submission of the invalid aggravating circumstance. *See Byrne*, at 515.

2052, 80 L.Ed.2d 674 (1984). The test requires first, "a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and second, a showing that the deficient performance so prejudiced the defense that the defendant was deprived of a fair and reliable trial. *Uresti v. Lynaugh*, 821 F.2d 1099, 1101 (5th Cir.1987) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064). The burden that *Strickland* imposes on a defendant is severe. *Procter v. Butler*, 831 F.2d 1251, 1255 (5th Cir.1987). In order to satisfy the deficiency prong of the *Strickland* test, for example the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional standards. *Martin v. McCotter*, 796 F.2d 813, 816 (5th Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 935, 93 L.Ed.2d 985 (1987). Given the almost infinite variety of possible trial techniques and tactics available to counsel, we must be careful not to second guess legitimate strategic choices which may now, under the distorting light of hindsight, seem ill-advised and unreasonable. We have stressed that, "great deference is given to counsel, 'strongly presuming that counsel has exercised reasonable professional judgment.' " *Martin*, 796 F.2d at 816 (quoting *Lockhart v. McCotter*, 782 F.2d 1275, 1279 (5th Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 873, 93 L.Ed.2d 827 (1987)).

In evaluating whether counsel's alleged errors prejudiced the defense, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Rather, the defendant must demonstrate

"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. "It is not our role to assume the existence of prejudice." *Czere v. Butler,* 833 F.2d 59, 64 (5th Cir. 1987). On the contrary, *Strickland* requires that the defendant affirmatively prove prejudice. *Id. Strickland* also authorizes us to proceed directly to the question of prejudice. Therefore, if Sawyer fails to demonstrate prejudice, the alleged deficiencies in Weidner's performance need not even be considered. *See Strickland,* 466 U.S. at 698-99, 104 S.Ct. at 2070; *Schwander v. Blackburn,* 750 F.2d 494, 502 (5th Cir.1984). Since both the performance and prejudice components of he ineffectiveness inquiry are mixed questions of law and fact, we must make an independent determination of whether the representation accorded Sawyer by counsel passed constitutional muster. *Ricalday v. Procunier,* 736 F.2d 203, 206 (5th Cir.1984); *Trass v. Maggio,* 731, F.2d 288, 292 (5th Cir.1984). With these considerations in mind, we now turn to the merits of Sawyer's contentions.[5]

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[5] In addition to his specific allegations of Weidner's ineffectiveness, Sawyer also contends that Weidner's failure to meet article 512's standards for death qualification rendered his assistance as counsel unreasonable *per se* under "prevailing professional norms." *See Strickland,* 466 U.S. at 688, 104 S.Ct. at 2065. Sawyer asserts that "prejudice from this form of inadequate representation may be presumed." We need not address the first contention for we do not agree with Sawyer that counsel's failure to meet the state law standard was presumptively prejudicial. In support of this proposition, Sawyer relies on language from *Strickland* to the effect that prejudice may be

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With respect to Sawyer's objections to voir dire, we need not decide whether counsel's failure to question prospective jurors about their views on the death penalty was professionally unreasonable because Sawyer has failed to demonstrate prejudice. Sawyer does not dispute the fact that the State questioned the prospective jurors on this point. Rather, Sawyer asserts that because "the actual value of the rights [counsel] so casually sacrificed cannot be measured in concrete terms," *Strickland* would excuse his failure to affirmatively demonstrate – or concretely allege – prejudice from counsel's actions. Sawyer's novel interpretation of *Strickland* is unsupported by authority and runs counter to our interpretation of that case. Sawyer also alludes to the prejudice which resulted

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presumed: (1) where "prejudice . . . is so likely that case by case inquiry is not worth the cost;" and (2) where the impairment of the sixth amendment right is "easy to identify and, for that reason . . . easy for the government to prevent." *See id.* at 692, 104 S.Ct. at 2067. Sawyer's reading of *Strickland* as establishing a generally applicable two-pronged test for presumptive prejudice is clearly in error. The Court in *Strickland* included the aforementioned language merely to illustrate why it presumes prejudice where there has been an actual or constructive denial of the assistance of counsel altogether, or where the state has prevented counsel from assisting the accused during a critical stage of the proceedings. *See id.* (citing *United States v. Cronic,* 466 U.S. 648, 659 & n. 25, 104 S.Ct. 2039, 2047 & n. 25, 80 L.Ed.2d 657 (1984)). The state trial court's failure to comply with article 512 did not result in an actual or constructive denial of the assistance of counsel. Therefore, we are unwilling to extend *Strickland's* limited relaxation of the prejudice requirement to the facts of this case. Sawyer's claims are subject to the general requirement that the defendant affirmatively prove prejudice.

from counsel's failure to rehabilitate veniremen who were excused because of their views contrary to the death penalty. Sawyer fails, however, to demonstrate that rehabilitation was possible. Unsupported allegations and pleas for presumptive prejudice are not the stuff that *Strickland* is made of. We find no merit in Sawyer's allegations that counsel's voir dire performance constituted ineffective representation of counsel.

At trial, Weidner objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well as the penalty for manslaughter at the guilt phase. Sawyer asserts that he was prejudiced by this objection because "[w]ithout this information, the jury would never realize that a conviction for second degree murder carried a mandatory life sentence, so that a vote against first degree would both remove the possibility of a death sentence and also insure permanent incarceration." By objecting to the jury's receipt of this information, Sawyer argues, Weidner deprived his client of any realistic opportunity for a second degree murder conviction and a chance of avoiding the penalty phase of trial. The district court, however, concluded that Sawyer's argument was without merit since "it was possible for the jury to recommend a sentence of life imprisonment on his conviction of first degree murder," and because Sawyer's "contention that the jury might have returned a verdict of manslaughter, had it known he could have received twenty years imprisonment, has even less support in light of the evidence."

Once again, Sawyer has failed to affirmatively demonstrate prejudice. He has not shown a reasonable probability that, absent Weidner's objection to the jury's

learning of lesser penalties, the jury decision would have been different. We note first that the evidence adduced at trial was more than ample to support the jury's determination that Sawyer was guilty of first degree murder.[6] Moreover, Sawyer fails to demonstrate a reasonable probability that the jury would have returned a verdict of guilty to either of the lesser offenses. Finally, as for avoiding the penalty phase of trial in hopes of securing a term

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[6] As the district court noted, "[Sawyer] did not seriously contest at trial his involvement in the beating and burning of the victim." In any event, the testimony of Cynthia Shano, an eyewitness to the incident, as well as the other testimony and physical evidence introduced at trial, provided a sufficient factual underpinning for the jury's verdict. The Louisiana Supreme Court found that: (1) "[t]here was . . . ample evidence from which a rational juror could have concluded beyond a reasonable doubt that [Sawyer] was engaged in the perpetration of aggravated arson;" (2) Sawyer's actions evinced the specific intent to inflict great bodily harm; and (3) the evidence was "plainly sufficient" to support the conviction. *State v. Sawyer*, 422 So.2d at 99. "That court's determination is entitled to great weight in our review." *Wingo v. Blackburn*, 786 F.2d 654, 655 (5th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1984, 95 L.Ed.2d 823 (1987).

Sawyer's chief defense at trial was that he lacked the specific intent to commit first degree murder due to intoxication. In reviewing this claim, the Louisiana Supreme Court concluded that "the jury reasonably rejected the defense." *State v. Sawyer*, 422 So.2d at 99. The Louisiana Supreme Court went on to hold that "[t]here was ample evidence from the testimony of the arresting officer and Ms. Shano from which a rational juror could have found that [Sawyer] acted with specific intent, despite his excessive consumption of alcohol." *Id.* Our review of the record shows this conclusion well supported by the evidence. Sawyer has failed to demonstrate otherwise.

of life imprisonment, Sawyer had consistently refused to accept such an offer by way of a plea bargain.[7]

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[7] Sawyer's assertions of prejudice are further belied by Weidner's testimony at the state habeas hearing. At the hearing, Weidner gave the following explanation for his actions:

A. . . . .

> My reasoning was that I didn't want the jurors to know the penalty for manslaughter was, you know, was twenty-one years. I didn't want them to know that. And that was basically a concession to Robert Sawyer. He was – Robert was insisting that we argue for manslaughter. And in light of the facts of the case, you know, and I explained to Robert I had, you know, "You're asking me to blow whatever credibility I may be able to build with the jury by doing that, especially if they find out that it's a twenty-one year sentence. You know, it's a relatively light sentence: they're going to figure out real quick that you, you know, with the other things, that you could be out of jail relatively soon if they find you guilty of manslaughter." So, kind of as a compromise between Robert, you know, I agreed we won't let them know what any of the penalties are. Let's try to set it up so that the jury knows that it's death or something else."

Q. So, Mr. Sawyer's anticipation in that area consisted of his instructing you to argue for manslaughter, and not for second degree murder?

A. Robert had consistently – he had been informed as late as the morning we began the trial that he could plead guilty to first degree murder without the death penalty. And he consistently refused and said "You tell them I will plead guilty to manslaughter and nothing else."

Next, Sawyer contends – however perfunctorily – that Weidner's failure "to object to inadmissible, inflammatory statements by the prosecutor" constituted an example of Weidner's prejudicial representation. Sawyer complains of Weidner's failure to object "to the prosecutor's use of facts not in evidence during voir dire, which facts were never established at trial." Specifically, Sawyer complains of references to the use of a hammer in the commission of the crime. The district court concluded that the prosecutor's reference to the hammer, when "viewed in perspective to the actual torture and brutality inflicted upon the victim, could have had only an inconsequential effect on the jury's verdict." Moreover, at trial, Weidner objected to the testimony of a state witness who alluded to the use of a hammer during the attack, and requested a mistrial. The trial court denied the request but instructed the jury that "until now there has been no testimony regarding any hammer by any other prior witness so I am going to ask you to disregard those comments and that statement by the witness and don't let that statement prejudice Mr. Sawyer in any way." Sawyer's assertion, therefore, is without merit.

Sawyer's next objection to Weidner's performance concerns counsel's use of expert testimony to support Sawyer's intoxication and toxic psychosis defenses. Sawyer complains that Weidner failed to secure his own expert witnesses and instead relied on "state" experts – psychiatrists who had been appointed to a pre-trial lunacy commission charged with determining whether Sawyer was competent to stand trial – who gave damaging testimony. Each of the psychiatrists in question examined Sawyer for approximately half an hour in connection

with the competency proceeding and concluded that Sawyer understood the nature of the charges against him and could assist his attorney in his defense. Weidner was successful in eliciting testimony from them which supported the toxic psychosis defense.[8] In his habeas

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[8] The following excerpts from the testimony at trial are instructive:

> Q. [By Weidner to Doctor Albert DeVilliere] Doctor, on approximately September the 27th, 1979 at some time around the time of 8:00 o'clock in the evening, Robert Sawyer went out to various lounges and began drinking. He drank a combination of MD 20/20 wine, shots of straight whiskey, beer, continued drinking without sleep from say approximately 8:00 p.m. in the evening, all night, his condition has been described at approximately 7:00 a.m. the next morning on September 28 when arriving home he was staggering drunk, barely able to walk.
>
> A. What time?
>
> Q. Approximately 7:00 a.m. in the morning. This is after being drunk all night long, continued to drink MD 20/20 wine at that time. At some time during the next five to six hours some very heinous acts occurred. At approximately 1:30 in the afternoon Robert Sawyer was described as sitting on the floor with his legs crossed looking glassy eyed and appearing to be in a stupor. This description given by a lay person such as myself, not by any physician.
>
> . . . .
>
> With the facts given to you from that hypothet, Doctor, can you render an opinion as to the condition you believe Robert Sawyer was in during the time.

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petition, Sawyer complains that these opinions were based upon a set of hypothetical questions only, and that

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> A. Well based on this information it is very possible a person under a great deal of alcohol and drinking continuously and assuming that the condition described is described by a person is fairly reasonable, a fairly reasonable individual who can assess the situation, you could see he was somewhat of a toxic psychosis. That he was probably, you can't say definitely, but that he probably was suffering with a toxic psychosis.
>
> . . . .
>
> Q. Doctor, a person who is suffering from toxic psychoses is it possible for them to form an intent or to actively desire something to happen?
>
> A. If you make the diagnosis of toxic psychoses it would hardly be likely that that person could form intent to do anything but he is liable to act out in a number of different ways.
>
> . . . .
>
> Q. Now Doctor, in layman's terms could a person in this state, in other words in the state we have described with this amount of alcohol be in a stupor, I'm talking about the layman's definition of forming an intent or actively desiring something to happen, could they do that?
>
> A. If you describe a person having the toxic psychoses it is highly unlikely they would be able to do that. Then you have, they could form intent in doing things, their behavior would not be erratic. They could have planned out behavior.
>
> . . . . . .

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Weidner should have procured an expert who could have testified as to the actual effect of alcohol on Sawyer. As the district court noted, "[Sawyer] does not suggest that type of examination would produce the type of results he seeks or that those results would even be obtainable." In addition, Doctor Albert DeVilliere, one of the two experts, testified both at trial and during the sanity hearing that a physician would have to have been at the scene of the crime during its commission to be in a position to render an opinion on Sawyer's intent or the effect of toxic psychosis on that intent at the time of the crime. Finally, as the district court concluded, Sawyer has failed to demonstrate sufficient evidence that he suffered from toxic

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Q. [By Weidner to Doctor Genevieve Arneson] Would you give us that opinion?

A. Well it is my opinion if Mr. Sawyer drank that much alcohol and his behavior towards the victim is as described by witnesses –

Q. Speak up.

A. Mr. Sawyer had drank that much alcohol and his behavior toward the victim is as described by witnesses, if his behavior is that described by a police officer who came to the house after they were called and he was simply sitting there, with his feet up near the head of the victim, then it would be my opinion that he was, he was psychotic and it was a toxic psychosis secondary to the alcohol.

Q. Doctor, when a person is in a toxic psychosis are they able to form intent?

A. No, not in the usual sense.

psychosis to support his claims. His assertions on this point, therefore, are without merit.

Sawyer also points to Weidner's waiver of closing argument at the guilt phase of trial. Sawyer asserts that "[a] failure to give a closing argument constitutes a clear breakdown in the adversary process under [*Strickland*] as the jury must infer that the defense counsel who waives argument has abandoned his client's case, and has nothing to say because he believes him to be guilty." Weidner testified during the state evidentiary hearing that his deliberate decision to dispense with closing argument was based on two separate considerations. First, having dealt with the prosecutor in other trials, Weidner knew that the prosecutor tended towards "mild" closing arguments and "saved all of his big guns" for rebuttal. Therefore, "all [Weidner] could see closing argument was going to do in the guilt phase of the trial was give [the prosecutor] a chance to come back behind [him], show them the picture again . . . and just make it worse." Second, Weidner realized the strong case the state had against Sawyer as to his guilt and felt that the best hope for salvaging anything for Sawyer was in the penalty phase, where Weidner hoped for a recommendation of life imprisonment. To further any possibility for success in the penalty phase, Weidner decided not to risk his credibility with the jury by advancing arguments that the jury might perceive as unsupportable.

The district court concluded that "[w]hile an attorney's decision to waive closing argument might ordinarily deprive a defendant of the effective assistance of counsel, we do not find that to be the result in the case before us." We agree that the waiver of closing argument

was not prejudicial on the facts before us. Weidner believed the evidence against Sawyer to be "overwhelming." That view seems to have been shared by all of the attorneys familiar with the case. Beevers, for example, was "convinced that there was overwhelming weight of evidence" against Sawyer and "[he]was concerned . . . about the high probability of a death penalty should [Sawyer] proceed to trial." Samuel Dalton, an attorney who testified for Sawyer at the state habeas evidentiary hearing, also recalled "that the evidence of the homicide was overwhelming." Moreover, we note that closing argument was not needed to organize and explain the defense position. The district court concluded that, "[u]nder the circumstances, the jury could not help but to have understood the nature of Sawyer's defense." After a thorough review of the record, we find no error in the district court's conclusion that the jury was fairly apprised of the nature of Sawyer's defense during voir dire and Weidner's opening statement, and that the testimony of defense witnesses as to aspects of the defense theory was simple and direct.

Sawyer's assertions of prejudice are unsupported by the record. He has failed to demonstrate what counsel might have said at closing that would have a reasonable probability of changing the result of the trial and therefore, in light of Weidner's tactical considerations and the strong evidence against Sawyer, we are unprepared to find that the waiver of closing argument here was prejudicial.

Finally, Sawyer contends that Weidner failed to prepare a competent penalty phase presentation. Specifically, Sawyer point to Weidner's alleged failure to conduct

sufficient investigation and uncover relevant mitigating evidence. Sawyer fails, however, to specify what other mitigating evidence was available or how that evidence could have affected the jury's decision. For example, Sawyer complains that Weidner could have called other family witnesses who would have been available to testify about mitigating circumstances. Yet, Sawyer neither describes the substance of that potential testimony nor details how the evidence uncovered would have done more than simply duplicate the testimony of Sawyer's sister and brother-in-law. He also complains that Weidner did not spend enough time preparing the witnesses to testify. It is clear, however, that brevity of consultation is insufficient to warrant habeas relief. *Schwander*, 750 F.2d at 499.

Sawyer also points to Weidner's closing argument as an example of attorney incompetence. In that closing, Weidner reiterated several dominant themes of his case: (1) that the jury bears a great responsibility and that they should be lenient by not "killing" Sawyer; (2) that the death penalty is improper under any circumstances; and (3) that Sawyer lived through a difficult childhood, had been in a mental hospital and had been drunk during the commission of the offense. While Weidner's closing was, as the district court noted, cursory and perfunctory, Sawyer has failed to affirmatively demonstrate prejudice. The closing was adequate to inform the jury of the defense's position. In addition, Sawyer has not articulated how Weidner's closing affected the jury's decision or could have been improved. Weidner's penalty phase presentation was imperfect but Sawyer has failed to demonstrate that it was constitutionally improper under *Strickland*.

For the foregoing reasons, we conclude that since Sawyer has failed to affirmatively demonstrate prejudice from any of Weidner's allegedly deficient actions as counsel, Sawyer's ineffective assistance claim must fail.

B. Equal Protection and Due Process

Sawyer claims that the state trial court's refusal to comply with the terms of article 512 violated his rights to equal protection. We need not, and most certainly do not, reach the question of whether this violation of state law actually rose to the level of an equal protection violation. Even if Sawyer could prove an equal protection violation, that violation would still be subject to a harmless error analysis and, under such an analysis, would clearly fail.

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court rejected the notion that errors of constitutional dimension necessarily require reversal of criminal convictions. *Id.* at 21-22, 87 S.Ct. at 826. Since *Chapman*, the Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *see also Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 3105, 92 L.Ed.2d 460 (1986). Despite the strong interests that support the harmless error doctrine,[9] however, the Court has

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[9] As the Court stressed in *Van Arsdall*:

> The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to

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recognized that some constitutional errors require reversal without regard to the evidence in the particular case. *Rose*, 106 S.Ct. at 3106. This limitation recognizes "that there are some constitutional rights *so basic to a fair trial* that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23, 87 S.Ct. at 827-828 (emphasis added).

The Court in *Rose* sought to clarify this notion:

> The State of course must provide a trial before an impartial judge, with counsel to help the accused defend against the State's charge. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.

Rose, 106 S.Ct. at 3106 (citations omitted). Harmless error analysis, therefore, "presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Id.* (citing *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436). As the Court stated in *Rose*, "[e]ach of the examples *Chapman* cited of errors that could never be harmless either aborted the basic trial process, or denied it altogether."

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> decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

Van Arsdall, 475 U.S. at 681, 106 S.Ct. at 1436 (citations omitted).

Rose, 106 S.Ct. at 3106 n. 6. Therefore, "while there are some errors to which *Chapman* does not apply, they are the exception and not the rule. Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." *Id.* at 3106-07. Sawyer has failed to overcome that presumption.

We agree with the district court that a state law right to "death qualified" counsel of five years experience is not included in *Chapman's* "basic to a fair trial" category. Sawyer concedes that the right to a five year attorney is not itself a federal constitutional right. He argues, however, that "the state's arbitrary abrogation of that right may give rise to an equal protection . . . violation." This federal constitutional right, the argument continues, is basic to a fair trial under *Chapman* "in the context of a breakdown in the state-guaranteed trial machinery in a capital case." We do not agree. The alleged constitutional violation in the instant case neither aborted the basic trial process nor denied it altogether, for Sawyer received the effective assistance of counsel.[10] "The thrust of the many

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[10] The Court in *Rose* placed a great deal of emphasis on the error's potential effect on the factfinding process at trial. *Rose*, 106 S.Ct. at 3106. Specifically, the Court emphasized the deleterious effect which errors such as judicial bias or denial of counsel might have on the composition of the record. *Id.* at 3107 n. 7. Where the error in question does not affect the record, "[e]valuation of whether the error prejudiced respondent . . . does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence." No such difficult inquiries are required in the instant

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constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments." *Id.* at 3107. Recognizing that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one," *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436, we conclude that the state trial court's failure to comply with article 512 does not compare with the kind of errors that have been found to automatically require reversal of an otherwise valid conviction. Sawyer's equal protection claim, therefore, was properly subjected to a harmless error analysis by the district court.

Having determined that a harmless error analysis is appropriate in this case, we must turn to the question of whether the state trial court's appointment of counsel with less than five years experience was indeed harmless. An error is harmless where, after reviewing the facts of the case, the evidence adduced at trial, and the impact the constitutional violations had on the trial process, the evidence remains not only sufficient to support the verdict but so overwhelming as to establish the guilt of the accused beyond a reasonable doubt. *United States v. Hastings*, 461 U.S. 499, 512, 103 S.Ct. 1974, 1982, 76 L.Ed.2d 96 (1983); *Germany v. Estelle*, 639 F.2d 1301, 1303 (5th Cir. March 1981), *cert. denied*, 454 U.S. 850, 102 S.Ct. 290, 70 L.Ed.2d 140 (1981); *Harryman v. Estelle*, 616 F.2d 870, 876 (5th Cir.) *cert. denied* 449 U.S 860, 101 S.Ct. 161, 66 L.Ed.2d

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case. The failure to appoint five year counsel did not affect the composition of the record in such a way as to prevent an appellate court from evaluating the potential harm to Sawyer.

76 (1980). Given the overwhelming evidence of guilt presented at Sawyer's trial, we agree with the district court that the state trial court's error was harmless beyond a reasonable doubt. Sawyer's equal protection claim, therefore, must fail.

Sawyer's due process claim is also meritless. Where there has been a violation of state procedure, the proper inquiry "is to determine whether there has been a constitutional infraction of the defendant's due process rights which would render the trial as a whole 'fundamentally unfair.'" *Manning v. Warden, Louisiana State Penitentiary*, 786 F.2d 710, 711-12 (5th Cir. 1986) (quoting *Nelsen v. Estelle*, 642 F.2d 903, 906 (5th Cir. Unit A April 1981)). In order to show that his trial was fundamentally unfair, Sawyer must demonstrate that some prejudice resulted from the state trial court's failure to appoint counsel with five years experience. *See Manning*, 786 F.2d at 712. As we explained earlier, Sawyer has failed to demonstrate prejudice and, therefore, his claim must fail.[11]

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[11] In the instant case, the district court applied a harmless error analysis to Sawyer's due process claims and found that any alleged violation was in fact harmless. We have found that there was no due process violation, since Sawyer's trial was not rendered fundamentally unfair by the state trial court's failure to appoint death-qualified counsel. Therefore we need not decide whether the district court's analysis was appropriate. We note that there are certain conceptual difficulties inherent in applying a *Chapman* analysis to a due process claim for, if the violation of state law rendered the trial fundamentally unfair, it would seem that the violation could never be harmless. Because we find no due process violation in the case at bar, however, we see no need to reconcile the conceptual difficulties, or to determine whether harmless error analysis can ever be appropriately applied to a due process claim.

C. *Caldwell Violation*[12]

Finally, Sawyer maintains that certain remarks by the prosecutor in closing argument at the punishment stage of his trial violate the rule of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and require that his sentencing process be redone.

Caldwell is a rule of narrow application. It applies only to comments that mislead a jury in the capital sentencing process by inducing it to feel less responsible than it should for the sentencing decision. *Darden v. Wainwright*, 477 U.S. 168, 183-84 n. 15, 106 S.Ct. 2464, 2473 n. 15, 91 L.Ed.2d 144, 159 n. 15. The rule is well illustrated by the case in which it was laid down.

In *Caldwell*, the defendant had murdered the female proprietor of a small, rural bait and grocery store in the course of a robbery. Defense counsel, unable to find much comfort in relevant fact or law, took refuge in rhetoric, dwelling at some length on the Sixth Commandment, the Savior, the Crucifixion, mercy, forgiveness and certain of the less desirable aspects of being electrocuted. In response, the prosecuting attorney attacked the defense for cynically heaping undue responsibility upon the jury, while the judge concurred - overruling an objection to the argument and directing its continuance:

> **ASSISTANT DISTRICT ATTORNEY:** Ladies and Gentlemen, I intend to be brief. I'm in complete disagreement with the approach the

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[12] The remainder of the opinion and the result represent the views of the panel majority, Judges Gee and Davis. The views of Judge King are set forth in her appended dissent.

defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know - they know that *your decision is not the final decision*. My God, how unfair can you be? *Your job is reviewable. They know it*. Yet the . . .

COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.

ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

THE COURT: Alright, *go on and make the full expression so the Jury will not be confused*. I think it proper that the jury realizes that it is *reviewable automatically* as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shalt not kill." If that applies to him, it applies to you, *insinuating that your decision is the final decision* and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and *as Judge Baker has told you*, that the decision you render is *automatically reviewable* by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so.

472 U.S. at 325-6, 105 S.Ct. at 2637-38 (emphasis added).

The Supreme Court, speaking through Justice Marshall – whose consistent view has long been that capital punishment is forbidden by the Constitution in any case whatever – declared this capital sentence unenforcible because it was imposed by a jury that had been misled by the judge and prosecutor about its critical and central role in the sentencing procedure. Concluding that the prosecutor's comments rendered the sentencing proceeding fundamentally unfair, a divided court required resentencing.

A considerable extension of *Caldwell* would be required to accommodate Sawyer's contentions. In our view, a most critical factor in *Caldwell* was the trial judge's approval and encouragement of the prosecutor's tendentious response to defense counsel's spread eagled oratory.[13] As our Brethren of the Eleventh Circuit have observed,

> Because of the trial judge's agreement with the prosecutor's comments, it was as if the jury received an erroneous instruction from the court at the sentencing phase of a capital proceeding, thus . . . mandating reversal."

Tucker v. Kemp, 802 F.2d 1293, 1295 (11th Cir.1986) (en banc), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987).

The Supreme Court took a similar view of the passage, observing that the judge "not only failed to correct

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[13] No criticism is implied; counsel had few, if any, other courses open to him and did what he could for his client with his back to the wall.

the prosecutor's remarks, but in fact openly agreed with them; he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor's portrayal of the jury's role was correct." *Caldwell*, 472 U.S. at 339, 105 S.Ct. at 2645. The comparable proceedings here, while falling short of perfection as do most actual trials, are a far cry from those in *Caldwell*. The respect in which they approach it most closely is in the remarks of the prosecutor; in all other respects of significance, they resemble if not at all. We do not condone the remarks in question and we shall discuss them in a moment. Before doing so, however, we think it appropriate to attempt to put the rule of *Caldwell* into a broader context and to sketch out a general approach for dealing with alleged breaches of it.

A general survey of the authorities indicates, as common sense supports, that the *Caldwell* problem results from prosecutorial attempts to counter a particular set of last-resort arguments by the defense in capital cases. Given that in most such cases verdicts must be unanimous, it necessarily follows that, when all else seems lost, counsel may seek to persuade at least one juror (if no more) that: he or she is being asked to "kill" the defendant, that killing is always wrong, that even evidence that seems absolutely conclusive is sometimes not, that at its best human judgment is fallible, that if the defendant is erroneously executed no correction of the error is possible, and that at all events mercy is better than retribution. Taken together, these are formidable arguments, arguments that can be made in any case whatever, arguments all of which are in varying degrees true. One response which they sometimes evoke from the prosecutor is an

exhortation to the jury to view its responsibility as a joint, rather than an individual, one; and several varieties of that response were made in this case, two permissible, one dubious.

The first called on the jury to view itself as the representative of the citizenry, as "we the people," declaring by its verdict that the acts of the defendant in torturing his victim to death were intolerable and should call down upon him the full force of the law. Another such argument appealed to their group spirit as jurors, assuring them that they did not stand alone in whatever they did but rather functioned together as an institution:

> It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so.

So far, so good; fair argument.

The next sentence, however, embarks upon a far different and more dubious sort of "joint responsibility" argument, one that vaguely and generally reassures the jury that "if you are wrong in your decision, believe me, there will be others who will be behind you to either agree with you or to say you are wrong. . . ." Who these "others" were, the jury was not told. In addition, at various points in the argument the prosecutor improperly referred to the jury's verdict as a "recommendation," and at another as "only the initial step." No objection was made by the defense at any of the foregoing points.

Following them, however, defense counsel advised the jury in his closing argument that:

> The decision whether Robert Sawyer lives or dies is in your hands. . . .
>
> I personally do not agree with the death penalty. I don't think there is any circumstance when anyone has the right to kill another person no matter how we try to get away from it. That is what we would be doing is killing another person. . . . I'm going to ask you to give Robert Sawyer the living death of life imprisonment. Don't kill. Thank you.

After the prosecutor's closing argument, in which he advised the jury that it really had no choice but to recommend the death penalty, "no matter how unpleasant or how difficult this type of decision may be for you to make," the judge charged the jury in standard form, directing them to the evidence as the basis for their decision, describing their forthcoming verdict in one place as a recommendation of sentence and at the other as the imposition of one, and concluding:

> It is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or life imprisonment. Go with Mr. Miller back in the jury room.

So much for the circumstances of how the jury was advised. We turn now to the law.

The vice in the argument against which *Caldwell's* rule is directed is not so much that it minimizes the jury's role in the capital sentencing procedure as that it minimizes it untruthfully.[14] It is all too likely that a lay juror

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[14] See Justice O'Connor, concurring partly and separately in *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

who has been told that panel after panel of judges – right up through the Supreme Court – will automatically "review" his verdict may believe that they "review" it as he decided it, in a plenary fashion. Were he told that the "review" it as he decided it, in a plenary fashion. Were he told that the "review" would not at all directly concern itself with the central issue before him, life or death for the accused, he would necessarily feel far less reassurance at the prospect. Where, however, a reading of the record makes clear that the jury was told that the life-or-death decision was up to them and that execution could not be exacted without their permission, we think that *Caldwell* is satisfied.

We think it plain that this was the case as to Sawyer. Both the prosecution and the defense, as well as the trial judge, advised Sawyer's jury that if it chose life imprisonment as its verdict, that was the end of the matter. The defense implored them to do so, and the prosecution – despite various ambiguous statements indicated above – told them it was up to them: "The decision is in your hands."

In the last analysis, the fundamental question, in this as in other habeas cases involving prosecutorial remarks complained of, is whether the petitioner has demonstrated that the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181, 106 S.Ct. at 2472, 91 L.Ed.2d at 157 (quoting from *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). In a *Caldwell* situation, however, we agree with our Brethren of the Eleventh Circuit that because the prosecutor's remarks typically amount to a mis-instruction to the jury

on the legal effect of their verdict, the reaction to them of defense counsel and trial judge are of especial importance:

> Of critical importance in *Caldwell* was the fact that the trial judge approved of the prosecutor's comments, stating that it was proper that the jury be told that its decision was automatically reviewable. *See id.; Caldwell v. Mississippi*, 472 U.S. at 325-26, 105 S.Ct. at 2638. Because of the trial judge's agreement with the prosecutor's comments, it was as if the jury received an erroneous instruction from the court at the sentencing phase of a capital proceeding, thus triggering the Eighth Amendment's heightened requirement of reliability in a capital case and mandating reversal.[2]

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[2] The Court in *Caldwell* noted that in *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), the trial judge took special pains to correct the prosecutor's impropriety, giving the jury a strong curative instruction. In contrast, in *Caldwell*, the trial judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them; he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor's portrayal of the jury's role was correct." *Caldwell v. Mississippi*, 472 U.S. at 2645, 105 S.Ct. at 2645.

Tucker, 802 F.2d at 1295.

Indeed, the only instance of reversal for a *Caldwell* violation in our Circuit to which we are cited or which our researches have located is *Wheat v. Thigpen*, 793 F.2d 621 (1986), in which the trial court approved the making of such an argument over defense counsel's objection:

> Again, I say to you and then I'll leave it to you, just remember this, if your verdict is that of the death penalty, that's not final. There's so many more people who will look at this case after you have made your decision in this case. Others will look at it, and look at your work, and see if you've made the right decision. And I can assure you, Ladies and Gentlemen, that if one finds that you have not, that they will send him back, and tell us to try it over, because someone made a mistake.
>
> **BY MR. STEGAL:** May It Please The Court, I'm gonna object to that again. He's telling this jury to go ahead and do something even if it's wrong, because if it's wrong, they're gonna send it back. That's not right. I'm gonna object.
>
> **BY THE COURT:** I think the argument was allowed – it was opened up on your argument. I'll overrule it.

793 F.2d at 628.

In so stating we do not, of course, intend to say that reversal is never appropriate in the case of a *Caldwell*-type misstatement unless it has been futilely objected to or endorsed as proper or correct by the trial judge. Each case must be evaluated on its own facts and circumstances; and it is not impossible to imagine statements by a prosecutor that, even absent an objection, minimize the jury's role to such a degree as to require reversal if left uncorrected. Even in *Caldwell*, however, where the trial court had overruled an objection and in doing so expressly endorsed the prosecutor's minimizing remarks, the Supreme Court emphasized that his remarks were "quite focussed, unambiguous, and strong." 472 U.S. at

340, 105 S.Ct. at 2645. And indeed they were: beginning with two accusations of duplicity on the part of the defense, the argument proceeds through an attack focussed on the defense's "insinuating" that the jury's decision was final, invokes the trial judge's already-expressed approval of its somewhat misleading statements, and winds up by assuring the jurors that their decision is "automatically reviewable by the Supreme Court." By contrast, the prosecutor's vague references in today's case to "others who will be behind you" and the like pale into relative insignificance.

The prosecutor in today's case indulged in no claim that the defense was disingenuously or cynically attempting to mislead the jury, as did his comparable figure in *Caldwell*. Nor did counsel raise any objection, futile or otherwise, to any of the prosecutor's remarks to which Sawyer now takes exception; and the trial court neither approved nor endorsed them. By contrast to the prosecutor's statements in *Caldwell*, which were quite focussed, unambiguous and strong – trumpeting automatic review by the Supreme Court and accusing the defense of deliberately misleading the jury as to its role – these were vague and ambiguous. And although we agree with the federal district court that the prosecutor's remarks complained of were improper, we also agree that they did not constitute reversible error – error that so infected the trial as to deny due process.[15]

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[15] The dissent in *Tucker* argued for a "no effect" standard for reversal, based on a concluding phrase at 472 U.S. 341, 105 S.Ct. at 2646 in the *Caldwell* majority opinion, "Because we

(Continued on following page)

IV.

For the foregoing reasons, we AFFIRM.

KING, Circuit Judge, dissenting in part:

I respectfully dissent from the majority's conclusion that the prosecutor's undeniably improper remarks about the finality of the death penalty determination did not violate the eighth amendment as interpreted and applied by the Supreme Court in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). I have several major concerns with the majority's analysis. First, by applying the fundamental fairness test of *Donnelly v.*

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cannot say that this effort [to minimize the jury's sense of responsibility] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the eighth amendment requires." 802 F.2d at 1298.

There is no gainsaying that the phrase appears in *Caldwell*, or that it can be read as Judge Kravitch and her two companions in dissent would read it. For a variety of reasons, however, we are not persuaded that the Court intended to impose such a well-nigh impossible burden upon the State as one to show, on pain of reversal, that any remark by a prosecutor in argument that might have a tendency to minimize the jury's sense of responsibility in a capital case had "no effect" on its sentencing decision. Such a test, for example, would make objecting a doubtful tactic, for an objection might bring a correcting instruction or one to disregard, thus removing the remark as a valid ground for appeal. Nor do we see how such a "no effect" test can lie in bed with the requirement, reiterated after *Caldwell* in *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2472, 91 L.Ed.2d 144, 157 (1986), that to obtain habeas relief on the basis of improper remarks by the prosecutor, petitioner must show that they so infected the trial as to deny due process.

DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), instead of the "no effect" test of *Caldwell*, the majority has reviewed the prosecutor's comments in this case under the wrong standard. Second, by holding that "a most critical factor in *Caldwell* was the trial judge's approval" of the prosecutor's remarks, the majority has adopted an artificially narrow and incorrect interpretation of *Caldwell* – an interpretation which effectively eviscerates the holding in that case. Third, the majority has also mischaracterized the prosecutor's comments here in order to force them outside the ambit of *Caldwell*. And finally, the majority has erroneously implied that other remarks by the trial court, prosecutor and defense counsel were sufficient to cure the comments of any constitutional impropriety.

The Prosecutor's Argument

The majority opinion gives the facts of the alleged *Caldwell* violation short shrift. But I think it is important to understand exactly what the prosecutor said here. The comments at issue were made by the prosecutor in his closing argument at the sentencing phase of Sawyer's capital trial. The prosecutor, in describing the jury's role, remarked:

> The law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States,* that you the people as a fact finding body from all the facts and

> evidence you have heard in relationship to this man's conduct *are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty. It is merely a recommendation* so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision (emphasis supplies).

The prosecutor went on to describe the brutal nature of the crime and, briefly, its impact on the victim and her mother. Then, once again turning to the function of the jury, the prosecutor stated:

> There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day,* is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. *All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less* (emphasis supplied).

Finally, after arguing that a death penalty would be justified in this case, the prosecutor noted:

> It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and *if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong* so I ask that you do have the courage of your convictions (emphasis supplied).

Caldwell, Donnelly and Darden

In *Caldwell*, the Supreme Court held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29, 105 S.Ct. at 2639. The Court noted that the capital sentencing scheme is premised on a "[b]elief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' [which allows the] Court to view sentencer discretion as consistent with – and indeed as indispensable to – the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.' " *Id.* at 330, 105 S.Ct. at 2640 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion)). The Court went on to specify a number of "specific reasons to fear substantial

unreliability as well as bias in favor of death sentences when there are state induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640.[1] Turning to the facts before it, the Court concluded that the prosecutor's comments sought to give the jury a

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[1] Initially, the Court recognized that "[b]ias against the defendant clearly stems from the institutional limits on what an appellate court can do – limits that jurors often might not understand." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640. The Court also noted that "[e]ven when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can freely 'err because the error may be corrected on appeal.' " *Id.* at 331, 105 S.Ct. at 2641 (quoting *Maggio v. Williams*, 464 U.S. 46, 54-55, 104 S.Ct. 311, 316, 78 L.Ed.2d 43 (1983)). A defendant could be executed, therefore, although no sentencer had ever made a determination that death was the appropriate sentence. The Court also raised the possibility that the jury, assuming that only a death sentence will be reviewed, might "understand that any decision to 'delegate' responsibility for sentencing can only be effectuated by returning that sentence." *Caldwell*, 472 U.S. at 332, 105 S.Ct. at 2641. The sentence that would emerge from such a proceeding would not represent a decision that the appropriateness of the defendant's death had been demonstrated; rather, the decision would present "the specter of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns" – namely, the desire to avoid responsibility for the decision. *Id.* Finally, given the fact that a capital sentencing jury is "made up of individuals placed in a very unfamiliar situation and called on to make a difficult and uncomfortable choice," an uncorrected suggestion that the ultimate determination of death rests elsewhere presents "an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333, 105 S.Ct. at 2642.

view of its role in the capital sentencing procedure that was fundamentally incompatible with the eighth amendment's heightened need for reliability. *Id.* at 340, 105 S.Ct. at 2645. As the Court "[could not] say that [the State's] effort had no effect on the sentencing decision," it was compelled to vacate the death sentence. *Id.* at 341, 105 S.Ct. at 2646.

In reaching its conclusion, the Court was careful to distinguish, on two separate grounds, the fourteenth amendment fundamental fairness inquiry of *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), from the case before it. First, the trial judge in *Donnelly* had agreed that the prosecutor's remarks in that case were improper and had given the jury a strong curative instruction. By contrast, in *Caldwell*, the trial judge not only failed to correct the prosecutor's remarks, but in fact openly agreed with them. *Caldwell* 472 U.S. at 339, 105 S.Ct. at 2645. Second, the prosecutor's remarks in *Donnelly* were ambiguous and did not so prejudice a specific constitutional right as to amount to a denial of that right. The remarks in *Caldwell*, in contrast, "were quite focused, unambiguous, and strong" and "were pointedly directed at the issue that [the] Court has described as 'the principal concern' of [its] jurisprudence regarding the death penalty, the procedure by which the State imposes the death sentence." *Id.* at 340, 105 S.Ct. at 2645 (citation omitted).

The Court subsequently clarified the reach of *Caldwell* and *Donnelly* in *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). In *Darden*, the Court was confronted by a variety of challenges to the prosecutor's closing argument at the guilt phase of a capital

murder trial. The Court relied on *Donnelly* in treating the relevant question as "whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden*, 106 S.Ct. at 2472 (quoting *Donnelly*, 416 U.S. at 643, 94 S.Ct. at 1871). The *Darden* majority was quite careful, however, to distinguish the facts in front of it from those in *Caldwell*.[2] *The Darden* Court specifically limited *Caldwell* "to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden*, 106 S.Ct. at 2473 n. 15. As the prosecutor's comments in *Darden* did not mislead the jury as to its role in the sentencing decision, *Caldwell* was inapplicable.

Standard of Review

I differ with the majority on the appropriate standard by which to review the comments at issue here. The

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[2] In *Darden*, the Court wrote that:

> There are several factual reasons for distinguishing *Caldwell* from the present case. The comments in *Caldwell* were made at the sentencing phase of trial and were approved by the trial judge. In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. The trial judge did not approve of the comments, and several times instructed the jurors that the arguments were not evidence and that their decision was to be based only on the evidence.

Darden, 106 S.Ct. at 2473 n. 15.

majority, relying on *Darden* and *Donnelly*, holds that the fundamental question, in this case as in other habeas cases involving improper prosecutorial comments, is whether the petitioner has demonstrated that the remarks rendered the trial fundamentally unfair so as to deny due process.[3] A fair reading of *Caldwell* and *Darden* cannot support this conclusion.

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[3] The genesis of this proposition may be found in the Eleventh Circuit's decision in *Tucker v. Kemp*, 802 F.2d 1293 (11th Cir. 1986) (en banc), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987). In *Tucker*, the court "borrowed" the prejudice prong of *Strickland* in order to apply the *Donnelly* fundamental fairness standard to *Caldwell*-type violations. *See Tucker*, 802 F.2d at 1295. That decision was roundly criticized by three judges in dissent. The dissenting opinion in *Tucker* discussed a number of shortcomings in the Eleventh Circuit's approach. The dissent noted, for example, that *Strickland* and *Caldwell* are fundamentally different in their assignment of the burden of proving prejudice. *Tucker*, 802 F.2d at 1298 (dissenting opinion). Unlike *Strickland*, *Caldwell* places the prejudice burden on the State. "Once the petitioner has shown that the prosecution attempted to minimize the jury's responsibility at the capital sentencing hearing, the state must show that 'this effort had no effect on the sentencing decision.' " *Id.* (quoting *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646). The dissent also stressed that while "the government is not responsible for, and hence not able to prevent, [defense] attorney errors that will result in reversal," *see Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067, "the state *can* control prosecutorial conduct and, in the capital sentencing context, is constitutionally obligated to do so." *Tucker*, 802 F.2d at 1298 (dissenting opinion). Finally, the dissent found it significant that the Supreme Court itself "did not apply its *Strickland* prejudice analysis to Caldwell's claim of prosecutorial misconduct at sentencing but instead reaffirmed the long line of cases requiring heightened reliability in capital sentencing proceedings." *Id.*

In *Caldwell*, the Court wrote: "Because we cannot say that this effort [to minimize the jury's sense of responsibility for determining the appropriateness of death] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." 472 U.S. at 341, 105 S.Ct. at 2646. The majority, while recognizing that the phrase exists and that the "no effect" test is a plausible interpretation of the Court's language, concludes, for a variety of reasons, that the Court could not have meant to place a higher burden on the State in an eighth amendment *Caldwell*-type situation than would otherwise be borne under the due process jurisprudence of *Donnelly* and its progeny. I find the majority's reasoning unpersuasive.

The majority argues that the adoption of the "no effect" test would impose a "well-nigh impossible burden upon the State." According to the majority, the State would be forced to show that *any* remark which tended to minimize the jury's sense of responsibility in a capital case had no effect on the sentencing decision. That is not so. In order to qualify as a *Caldwell* violation, the prosecutor's remarks concerning the jury's rule must be "focused, unambiguous and strong." *Id.* at 340, 105 S.Ct. at 2645. Moreover, the remarks would typically be made at the sentencing phase of trial rather than during voir dire, *see Byrne v. Butler*, 845 F.2d 501, 501, 509 (5th Cir. 1988), or during the guilt-innocence stage, *see Darden*, 106 S.Ct. at 2473 n. 15. Finally, the remarks must not be corrected by an appropriate instruction from the trial court. *Caldwell's* "no effect" test, therefore, is limited to a subset of particularly forceful prosecutorial comments on a narrow topic, generally presented to a capital jury at the

sentencing phase of trial, which are not corrected by the trial court. So, while the burden on the State may in fact be "well-nigh impossible," it is borne only in a narrow class of cases.

The majority also argues that the "no effect" test cannot be squared with *Darden's* reaffirmation of the *Donnelly* test in *most* cases involving improper remarks by a prosecutor. The principles of *Caldwell*, however, were not applicable in *Darden*. *Darden*, 106 S.Ct. at 2473 n. 15. Since the prosecutor's comments in *Darden* could not have misled the jury into thinking that it had a reduced role in the sentencing process, any eighth amendment argument was unconvincing and the Court felt free to apply the more generally applicable due process standard of review. *Darden* did not hold that the *Donnelly* standard should be applied to *Caldwell* violations. If it had, the Court would not have needed to go to such great lengths to distinguish *Caldwell*.[4] *See id*. It is clear, therefore, that in the peculiar eighth amendment context of the *Caldwell* violation, a stricter standard of review applies.[5] Prosecutorial

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[4] By reviewing Justice Blackmun's dissenting opinion in *Darden*, which was joined by three of the other four members of the *Caldwell* majority, the error in the majority's analysis can be readily discerned. In *Darden*, the dissent charged that the Court rejected "the 'no effect' test set out in *Caldwell*" without identifying which standard it was using. *Darden*, 106 S.Ct. at 2480 (Blackmun, J., dissenting). The Court responded to the dissent's charges by distinguishing *Caldwell* so that it could apply the *Donnelly* standard to the facts before it. At no point, however, did the Court take issue with the dissent's characterization of the *Caldwell* standard as a "no effect" test.

[5] Justice Rehnquist, in his dissenting opinion in *Caldwell*, clearly believed that the Court had rejected the *Donnelly*

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comments which truly qualify as *Caldwell* violations cannot be reviewed under the *Donnelly* standard.[6]

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standard. Justice Rehnquist "[found] unconvincing the Court's scramble to identify an independent Eighth Amendment norm that was violated by the [prosecutor's] statements," and concluded that "[a]lthough the Eighth Amendment requires certain processes designed to prevent the arbitrary imposition of capital punishment, it does not follow that every proceeding that strays from the optimum is *ipso facto* constitutionally unreliable." *Caldwell*, 472 U.S. at 350-351, 105 S.Ct. at 2650-51 (Rehnquist, J., dissenting). Justice Rehnquist chided the Court for not heeding the directives of *Donnelly* and for not applying a fundamental fairness test. *Id*.

[6] The panel's discussion of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3103, 92 L.Ed.2d 460 (1986), underscores the error in the majority's adoption of a fundamental fairness standard in this case. In *Chapman*, the Court recognized that some errors necessarily render a trial fundamentally unfair. *Rose*, 106 S.Ct. at 3106. There are certain constitutional protections so basic to a fair trial that without them a criminal proceeding cannot reliably serve its function as a vehicle for the determination of guilt or innocence, and the criminal sanction may not be regarded as fundamentally fair. *Id*. Such errors either abort the basic trial process or deny it altogether. *Id*. at n. 6. The *Caldwell* violation presents a clear example of a breakdown in the trial process. The pernicious effects of focused, unambiguous and strong prosecutorial remarks concerning the jury's rule in the sentencing process and the inevitability of appellate review are impossible to measure. Consequently, where such remarks are left uncorrected by the trial court, there is an intolerable danger that they affected the sentencing decision. For all the reasons reviewed by the Court in *Caldwell*, such remarks create an unacceptable risk of systemic breakdown, thereby poisoning the reliability of the death sentence.

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Nature of a Caldwell Violation

I also differ with the majority's description of the nature of what has come to be called a *Caldwell* violation. Not content with *Darden's* express limitation of *Caldwell* to a particular type of prosecutorial comment at the sentencing phase of trial, the majority would further restrict the reach of *Caldwell* to those rare instances in which the trial court expressly approves the prosecutor's improper remarks. Essentially, the majority would make the trial court's imprimatur a prerequisite to finding a *Caldwell* violation. The majority's position is based on a tortured reading of *Caldwell*.

The majority ignores the fact that the Supreme Court framed the *Caldwell* issue throughout the majority opinion solely in terms of the prosecutor's remarks:

> In this case, *a prosecutor urged the jury* not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court. We granted certiorari . . . to consider petitioner's contention that *the prosecutor's argument* rendered the capital sentencing proceeding inconsistent with the Eighth Amendment's 'heightened need for reliability. . . .' "

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Given that the eighth amendment demands a heightened degree of reliability in any case where the State seeks to take the life of a defendant, the prosecutor's remarks necessarily rendered the proceedings fundamentally unfair. It is our inability to measure the effect of such remarks, combined with the very grave threat to the integrity of the proceedings posed by such remarks, that militates in favor of the "no effect" test.

Caldwell, 472 U.S. at 323, 105 S.Ct. at 2636 (emphasis supplied). The majority opinion in *Caldwell* is divided into approximately thirteen parts and subparts, and the only mention of the trial court's endorsement of the prosecutor's remarks is in Part IV-C of the opinion in which the Court sought to distinguish *Donnelly*. While the Court did note that the trial judge had approved the remarks in the case before it, it did not establish that fact as a prerequisite to its ultimate condemnation of the prosecutor's actions. Rather, the Court identified *two* important factors which distinguished *Donnelly*. First, the Court looked at the trial court's actions and found that, unlike in *Donnelly*, the trial court not only failed to correct the improper remarks, it also endorsed them. *Id*. at 339, 105 S.Ct. at 2645. Next, the Court looked to the character of the remarks and determined that the prosecutor's comments differed from those in *Donnelly* because they were "focused, unambiguous and, strong" and because they prejudiced a specific constitutional right, i.e., an eighth amendment right. *Id*. at 340-41, 105 S.Ct. at 2645-46. The Court went on to confirm that such comments, *if left uncorrected*, might so affect the fundamental fairness, of the sentencing proceeding as to violate the eighth amendment. *Id*.

Given *Caldwell's* overwhelming emphasis on the character and effect of the prosecutor's argument itself,[7] the

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[7] Justice O'Connor, in her concurring opinion, noted that "the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." *Id*. at 342, 105 S.Ct. at 2646 (O'Connor, J., concurring). Justice O'Connor's concurring

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question of whether the trial court endorsed the comments must be viewed as merely a factor in a larger inquiry. A proper inquiry must focus on the nature of the prosecutor's remarks themselves *and* on the character of the trial court's response to those remarks. Moreover, an evaluation of the trial court's response is not limited to the question of whether the trial court endorsed the remarks. Where this not the case, the Court's references to curative action would be superfluous for silence would be sufficient medicine for what ailed the proceedings. I do not think *Caldwell* can fairly be read, therefore, as holding that the trial court's endorsement of the prosecutor's remarks is a prerequisite to finding an eighth amendment violation.

Nature of the Prosecutor's Remarks

The majority, casting the prosecutor's remarks in a more favorable light than they merit, weaves the threads of an admittedly "improper" argument into a harmless tapestry of vague, disjointed and forgiveable[8]

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opinion focused exclusively on the prosecutor's remarks, never once mentioning the trial court's endorsement of those remarks.

[8] The majority also strives to justify the prosecutor's remarks on the ground of practical necessity. Prosecutors need such arguments, the majority suggests, to deal with the "formidable" argument, typically urged as a "last-resort" by struggling defense counsel, that the decision whether the defendant merits execution rests with each individual juror, that human judgment is not infallible, that mistakes can be made and that

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prosecutorial comments. My own review of the record has led me to conclude that the prosecutor's remarks in the instant case are sufficiently similar to those found constitutionally wanting in *Caldwell* as to merit vacation of Sawyer's sentence.

In the instant case, the prosecutor told the jury:

> Don't feel like you are the one, because it is very easy for defense lawyers to try and make each

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death is one error which cannot be corrected. The majority points out, as it must, that such arguments are "in varying degrees" true. Those weighty factors, however, are precisely the sort of considerations which society has entrusted the jury to weigh in reaching its decision. Those decisions are at the core of the heightened need for reliability demanded by the eighth amendment of sentencing proceedings in capital trials.

The prosecutor is free to emphasize the collective nature of the jury decision. He is also free to emphasize that the defendant himself bears the responsibility for the consequences of his actions. The prosecutor most certainly made those arguments in this case. The prosecutor is not free, however, to diminish the jury's sense of the finality of their decision by repeatedly alluding to the specter of appellate review. By doing so, the prosecutor may well leave the jurors with the notion that their moral judgment in favor of death will be reviewed for error. *See Caldwell*, 472 U.S. at n. 7, 105 S.Ct. at n. 7. This may hold true even when the prosecutor has stressed that "the decision" is in the jury's hands for "the decision" in that case would be the decision to send a message, or the decision to start the ball rolling, or the decision that the jury wants the case, reviewed. *See Id.* at 330-333, 105 S.Ct. at 2640-41. It would not be the decision demanded by society and required by the eighth amendment: that the defendant merits execution because death is the appropriate punishment for the crime he has committed.

> and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong. . . .

While the majority is arguably correct in dismissing the first portion of this comment as a permissible "joint-responsibility" argument, it is remiss in not recognizing the answer to the query it asks with respect to the latter portion: who are the "others" who will be behind the jury to agree with their decision or correct them if they are wrong? The answer is suggested in an earlier comment by the prosecutor:

> . . . what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body- . . . are of the opinion that there are aggravating circumstances as defined by the statute, by the State legislature that this is the type of crime that deserves that penalty.

Just as the *Caldwell* prosecutor referred to the ultimate reviewability of the jury's determination, so too did the prosecutor here make several unambiguous allusions to the inevitability of appellate scrutiny, naming the potential reviewers as he did so. As if the intended suggestion was not already clear enough, the prosecutor went on to hammer home his point by explicitly referring to judicial review and by couching his description of the jury's

decision in language bespeaking possibility rather than finality:

> You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day. . . . All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less.

The contested remarks here are precisely the sort of comments condemned in *Caldwell* as tending to impart to the jury a view of its role in the capital sentencing procedure that is fundamentally incompatible with the eighth amendment's heightened need for reliability in the death sentence determination. It is unnecessary to decide whether any one remark violated *Caldwell* for it is readily apparent that the prosecutor's repeated references to appellate review and the jury's limited role in the death sentence calculus surely did so. When viewed in their totality, the remarks appear "focused, unambiguous and strong." *See Caldwell*, 472 U.S. at 340, 105 S.Ct. at 2645. The prosecutor clearly sought to leave the jury with the notion that their recommendation of death would be merely "the initial step" and that the "others who will be behind" them would be there to correct any error in that determination. The message of non-finality was clear.

The Trial Court's Response

Having determined that the prosecutor's remarks were inappropriate under *Caldwell*, a question remains

whether subsequent action by the trial court was sufficient to preclude reversal. *See Caldwell*, 472 U.S. at 339-40, 105 S.Ct. at 2645; *See also Bell v. Lynaugh*, 828 F.2d 1085 (5th Cir.), *Cert. denied*, ___ U.S. ___, 108 S.Ct. 310, 98 L.Ed.2d 268 (1987). The majority notes that the trial court delivered a standard form jury instruction informing the jury that it was their responsibility to deliver a sentence of death or life imprisonment. While that much is true, it is equally clear that the trial court did little if anything to correct the damage that was done. This is particularly so with respect to the prosecutor's comments regarding appellate review. Even if the trial court's instructions left the jury with the view that they had an important role to play, they did nothing to undermine the prosecutor's suggestion that the jury's determination would be reviewed by an appellate court to assure its correctness. *See Caldwell*, 472 U.S. at 340 n. 7, 105 S.Ct. at 2645 n.7.

This is not a case where the trial court admonished the jury to disregard the prosecutor's comments. Nor is this a case where the trial court meticulously instructed the jury on the errors in the prosecutor's argument. I do not presume to establish a general standard by which to judge the efficacy of a trial court's curative instructions in a *Caldwell* violation context. I merely note that in the instant case, the trial court's instructions[9] were

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[9] The majority, in an effort to bolster its position that the prosecutor's remarks were later "cured", points to the fact that *defense* counsel informed the jury that "[t]he decision whether Robert Sawyer lives or dies is in your hands." That remark was patently insufficient to relieve the jurors of any mistaken impressions they might have held as to their role in the death

(Continued on following page)

insufficient to disabuse the jury of the notion that final responsibility for the sentencing decision might lay elsewhere.

In summary, because I believe that the prosecutor's effort to minimize the jury's sense of responsibility for determining the appropriateness of death cannot be said to have had no effect on the sentencing decision, I believe that the writ must be granted as to the sentence imposed upon Sawyer. I dissent from the majority's decision to affirm the district court's denial of the writ.

(Continued from previous page)

penalty determination. In fact, any initial confusion by the jury might well have been exacerbated by defense counsel's espousal of a position contrary to that which the prosecutor seemed to embrace. The jury may have understood the remark, made just after the prosecutor had finished insinuating that the jury's decision was not final, to signify the existence of a true dispute on the rule of the jury. Therefore, defense counsel's remark, when considered along with the prosecutor's earlier comments, may well have added to the cloud of uncertainty billowing around the jury about its own role. Consequently, the majority's reliance on the curative properties of defense counsel's remark is misplaced.

United States Court of Appeals

FIFTH CIRCUIT

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No. 87-32-74 - Sawyer v. Butler
(USDC No. CA-86-0223-"I"(4)

Dear Counsel:

The En Banc court requests that counsel in this case submit additional briefs discussing the relevance of the Supreme Court's recent decision in *Teague v. Lane*, 57 U.S.L.W. 4233 (1989), to Sawyer's petition. The Court wishes to know whether *Teague* precludes Sawyer from raising *Caldwell* issues in a collateral attack on his conviction. Counsel should address the following questions, although they need not limit themselves to these questions:

1. Does *Caldwell* articulate a rule that is new within the meaning of the *Teague* test? In

answering this question, please discuss the significance of the Louisiana cases dealing with prosecutorial argument that diminishes the responsibility of a capital jury. *See, e.g., Steve v. Willie*, 410 So. 2d 1019 (La. 1982). The Court wishes to know whether these cases rest upon state law rules, or upon the Eighth Amendment to the Constitution, and what effect, if any, they have upon the newness of Sawyer's *Caldwell* claim for *Teague* purposes.

2. Does *Teague* apply to collateral attacks upon a sentencing proceeding in a capital case?

3. Does *Caldwell* announce a rule that falls within the "fundamental fairness" exception to the *Teague* rule?

Sawyer's brief should be filed on or before May 12. Louisiana's brief should be filed on or before May 19.

Very truly yours,
GILBERT F. GANACHEAU, Clerk
by /s/ Amanda K. Vockroth
Amanda K. Vockroth
Case Manager

AKV/dme

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3274

ROBERT SAWYER,
Petitioner-Appellant,

versus

ROBERT H. BUTLER, SR., Warden,
Louisiana State Penitentiary,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(August 15, 1989)

Before CLARK, Chief Judge, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.*

HIGGINBOTHAM, Circuit Judge:

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* When this case was orally argued before and considered by the court, Judge Rubin was in regular active service. He participated in both the oral argument and the en banc conference, and with Judge King in the preparation of her dissenting opinion. He took senior status, however, on July 1, 1989. Based on his understanding of the Supreme Court decision in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 718, 80 S.Ct. 1336 (1960), he considers himself ineligible to participate in the decision of this case, but he adheres to the views in Judge King's dissent.

Robert Sawyer was sentenced to death by a Louisiana jury on September 19, 1980 for the brutal slaying of Frances Arwood. Today we decide his appeal from the denial by a United States District Court of his petition for writ of habeas corpus. We have elsewhere recorded the long history of Sawyer's efforts to overturn his conviction.[2] Sawyer's attack has now boiled down to three arguments. First, he argues that his court-appointed trial counsel was ineffective in certain respects. Second, and closely related to the first, he argues that his conviction should be set aside because his appointed counsel had not been licensed for five years as required by La. Code Crim. P. art. 512. Finally, he argues that the prosecutor in closing argument misled the jury about its role in capital sentencing as condemned by *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

A panel of this court rejected Sawyer's contentions, dividing over the *Caldwell* issue, and we took the case *en banc*. We reject Sawyer's first two contentions for the reasons stated by the panel, affirm the district court's denial of Sawyer's petition for relief from his conviction, and turn to the difficult question of whether Sawyer is entitled to a new sentencing hearing because the state misled the jury about the jury's responsibility in deciding whether Sawyer should be executed.

Part I summarizes the facts. In Part II we sketch the constitutional principles that frame our inquiry. We next in Part III address the statutory overlay to the constitutional issues, as presented by the Supreme Court's recent

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[2] *Sawyer v. Butler*, 848 F.2d 582 (5th Cir. 1988).

decision in *Teague v. Lane*, 109 S.Ct. 1060 (1989). Because we conclude that we cannot apply *Teague* without first defining the scope of *Caldwell*, we turn back in Part IV to the substantive constitutional questions. We endorse a version of Sawyer's construction of *Caldwell*. We find in Part V, however, that *Caldwell* so defined is a new rule within the meaning of *Teague*, and that *Caldwell* does not fit within either of *Teague's* two exceptions. Sawyer's *Caldwell* argument is therefore *Teague*-barred. The prosecutorial argument complained of will thus vitiate Sawyer's death sentence only if Sawyer can prevail under the earlier rule of *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). In Part VI we conclude that Sawyer has no *Donnelly* claim. We therefore affirm denial of Sawyer's petition to vacate his sentence.

I

Caldwell addressed constitutional issues that arise when a prosecutor misleads a capital jury about its responsibility for the sentencing decision. The prosecutor's argument creates a possibility that the jury will decide between life and death without an appropriate sense of grave responsibility. Sawyer contends that *Caldwell* mandates a new sentencing trial any time a prosecutor taints the proceeding with a *Caldwell*-type argument, unless the argument had "no effect" upon the jury. Louisiana, however, says that a *Caldwell*-type prosecutorial argument will not generate constitutional grounds for reversal unless the argument rendered the sentencing phase "fundamentally unfair" to the defendant. Louisiana would have us focus upon effective prejudice to the defendant, rather than effective dilution of the jury's

sense of responsibility. The case turns upon this disagreement.

Sawyer's *Caldwell* claim arises out of remarks which the prosecutor made in his closing argument during the trial's sentencing phase. The details of the prosecutorial remarks are important to Sawyer's argument. We therefore repeat those remarks here. The prosecutor told the jury,

> The law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States,* that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct *are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is a type of crime that deserves that penalty. It is merely a recommendation* so try as he may, if Mr. Weidner tells you that each and every one of you I hope can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision [emphasis supplied].

The prosecutor drew the jury's attention to the brutal nature of the crime for which Sawyer stood convicted.

The prosecutor then returned to the theme of the jury's responsibility, saying

> There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the judges that are going to review this case after this day,* is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and impact of the law of Louisiana. *All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less* (emphasis supplied).

After arguing that a death penalty was justified in Sawyer's case, the prosecutor struck the theme of jury responsibility again, telling the jury that their mistakes could be corrected by later decision-makers:

> It's all your** doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and *if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong* so I ask that

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** This word was likely recorded inaccurately by the stenographer. From context, it is clear that the prosecutor said, "It's all *you're* doing." The two phrases sound identical, but their meanings are nearly opposite.

> you do have the courage of your convictions (emphasis supplied).

II

The problem of *Caldwell* error touches upon three of the Constitution's grandest themes. Two of these are obvious. The problem implicates federalism, because the state asserts a power to decide for itself questions of criminal procedure. *Caldwell* analysis also concerns individual rights, since the defendant contends that diminishing a capital jury's sense of responsibility subjects him to cruel and unusual punishment. The third theme is perhaps less obvious, but no less important to understanding the issues raised by a *Caldwell* claim. *Caldwell* touches the principle of popular self-government, because the direct expression of popular sentiment through juries remains an important aspect of the people's participation in the government, and a crucial check upon the state's authority to define the limits of crime and punishment.

The jury seems always to be at the center of the judicial struggle with the death penalty. This should not be surprising. Differences over the role of the jury reflect differences over the wisdom of the penalty itself. The legislative judgment specifying execution as the punishment appropriate to certain crimes embodies a confidence both about the moral principles of the community and about the capacity of the criminal justice system to resolve factual disputes. Coupled to that confidence must be an equal certitude that the jury will be able to bring the community's principles to bear, and so judge blame and guilt accurately in the individual case.

In *McGautha v. California*, 402 U.S. 183 (1971), Justice Harlan summarized how history had given expression to this deep link between the death penalty and the jury. Justice Harlan explained that legislatures "to meet the problem of jury nullification . . . did not try, as before, to refine further the definition of capital homicides. Instead, they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact." *Id.* at 199. Justice Harlan observed that the Court had earlier concluded that "one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary and community values and the penal system – a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society." *Id.* at 202, *quoting Witherspoon v. Illinois*, 391 U.S. 510, 519 n.5 (1968).

We have long recognized that decisions that depend essentially upon inarticulable judgment and common sense intuition are prime candidates for jury decision. Indeed, we refer to these judgments as "blackbox decisions." The sentencing decision in capital cases is born out of an inherent and unique mixture of anger, judgment and retribution, and requires a determination whether certain acts are so beyond the pale of community standards as to warrant the execution of their author. This decision to punish by death is a paradigmatic "blackbox" call. To say that the decision can at best only be guided, not determined, by a judicial instruction or lawyers' argument underscores the decision's irreducible discretionary core.

A commitment to jury resolution of these blackbox decisions reflects a commitment to submit these issues to an active exercise of practical judgment, rather than to the reified precision of legal analysis. But the jury, of course, checks not only legalism but the government more generally. It protects from punishment those defendants who are innocent in the judgment of their peers. For both these reasons, the right to trial by jury has long been cherished within our legal tradition. Blackstone commended juries as an "admirable criterion of truth, and most important guardian both of public and private liberty." W. Blackstone, 4 *Commentaries* 407. The Constitution expressly secures the right to jury trial. It is, then, neither coincidental nor surprising that the jury's integrity should be so aggressively protected in capital cases, when the stakes are so high.

Of course, the Court has since rejected *McGautha's* teaching that "[t]o identify before the fact the characteristics . . . in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." 402 U.S. at 204. The Court has demanded that states guide the jury's discretion. The Court has also permitted states to take some power away from the jury. But the jury's sense of gravity, and the responsible discretion it fosters, remain crucial to post-*McGautha* sentencing schemes. *Caldwell* articulates a constitutional protection against state conduct that diminishes the jury's perception of its awesome responsibility.

In this sense, *Caldwell* itself is but the trace of a more comprehensive rule, one that might have trusted jury discretion to protect individual rights and express the

scope of state power. The Court's post-*McGautha* jurisprudence has instead sought to secure individual rights by limiting jury discretion, and has deferred to the states' own restrictions upon jury power. The Constitution, after all, permits the people to speak through state law as well as through juries. Federalism, no less than jury participation, ties local penalties to local sentiment and local judgment.

Nonetheless, it is necessary to perceive the larger theme in order to understand its trace within the composition that remains. *Caldwell* stands in part for the continuing vigor of the ideals articulated by Justice Harlan in *McGautha*. *Caldwell* treats jury discretion within a framework that recognizes both federal and state limits upon the jury's power. But it is the larger whole behind the trace which accounts for *Caldwell's* peculiar nexus to the constitutional mix of individual autonomy, federalism, and populism.

Indeed, this reflection of *McGautha's* ideals in *Caldwell* forms the lynchpin of Sawyer's argument here, and was the fulcrum for the argument that divided our panel. Only if *Caldwell* harkens back to the high esteem which *McGautha* accorded jury discretion can *Caldwell* impose, as Sawyer would have it, considerably more stringent restrictions than its Due Process Clause precursor, *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). *Donnelly* subjected prosecutorial argument to a generalized "fundamental fairness" standard, which would benefit Sawyer only were he able to show actual prejudice from the argument complained of. Sawyer's principal argument presupposes that the Eighth Amendment, as interpreted by *Caldwell*, puts a particular premium upon

responsible jury discretion in a proceeding that fixes punishment at life or death. It is that premium which would, on Sawyer's argument, distinguish *Caldwell* from *Donnelly*. The existence of that premium in turn assumes that a jury's deliberation may be even more crucial at the punishment phase than it is in choosing between guilt and innocence. That assumption makes sense only if, as Justice Harlan argued in *McGautha*, the jury's capacity to express moral sentiment directly is peculiarly essential to questions of capital blameworthiness.

Because Sawyer's claim comes before us by way of a habeas petition, not by direct appeal, we view the delicate constitutional mix through a similarly complex statutory overlay. The law of the habeas writ balances the vindication of constitutional rights against the state's constitutionally legitimate interest in maintaining a criminal justice system capable of producing final convictions. The Supreme Court refined anew this balance in *Teague v. Lane*, 109 S.Ct. 1060 (1989). *Teague's* rule precludes habeas petitioners from seeking to overturn their convictions on the basis of rules new by comparison with the date their convictions became final. This statutory balance provides, however, exceptions for constitutional claims of a certain character. It may therefore wrap back around the constitutional issues, and so, in Sawyer's case, back around the questions about jury responsibility in capital cases. Yet a plurality, at least, of the *Teague* Court regarded the *Teague* retroactivity inquiry as a preemptive threshold to constitutional analysis. 109 S.Ct. at 1069. *Accord, Penry v. Lynaugh*, 109 S.Ct. ___, ___ (1989) (applying *Teague* as

threshold barrier to constitutional analysis). Because *Teague* may present a threshold barrier to fuller consideration of Sawyer's constitutional claims, we begin our analysis with that case.

III

The Supreme Court did not decide *Teague* until after the *en banc* court heard oral argument in this case. At our request the parties have filed briefs regarding *Teague's* applicability to Sawyer's petition.

Teague adopts much of what Justice Harlan long advocated as the correct view of federal habeas. Under *Teague* a federal habeas petitioner attacking a final state conviction may rely only upon the law in effect when his conviction became final. There are two exceptions. First, the petitioner may rely upon a new rule if it would place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 1073 (quoting *Mackey v. United States*, 401 U.S. 667, 692, 91 S.Ct. 1160, 1175, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in part and dissenting in part)). The Court has since declared that this first exception also applies to rules which exempt certain persons entirely from capital punishment. *Penry*, 109 S.Ct. at ___. Second, the petitioner may rely on a new rule requiring the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty' " *Teague*, 109 S.Ct. at 1073, *quoting Mackey*, 401 U.S. at 639 (opinion of Harlan, J.) (inside quote from *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152 (1937) (Cardozo, J.)).

A majority of the *Teague* court fully subscribed to this restriction on the use of federal habeas to attack final state court convictions. *Teague* left much of the restriction's content in doubt, although some of that ambiguity was removed by the Court's later decision in *Penry v. Lynaugh*, 109 S.Ct. at ___, ___ (opinion of O'Connor, J., for the Court). In *Teague* itself, four justices concluded, in an opinion by Justice O'Connor, that the second proviso, drawn from Cardozo's incorporation formulation, should be modified to limit its scope "to those new procedures without which the likelihood of an accurate conviction is seriously diminished." 109 S.Ct. at 1076-77. The remaining justices filed four separate opinions: Justice White concurred separately, as did Justice Stevens; Justice Blackmun joined part of Justice Stevens's opinion, and added a brief writing of his own; and Justices Brennan and Marshall dissented.

Teague was not a capital case, and the plurality disclaimed any decision regarding its application to an effort by a state prisoner to overturn his death sentence. Justice Stevens joined Justice O'Connor's opinion insofar as it adopted Justice Harlan's restrictions on federal habeas. He dissented, however, from the plurality's insistence that "the only procedural errors deserving correction on collateral review are those that undermine 'an accurate determination of innocence or guilt'. . . . " *Id.* at 1081. He suggested that "a touchstone of factual innocence would provide little guidance in certain important types of cases, such as those challenging the constitutionality of capital sentencing hearings." *Id.* Justice Stevens noted that Justice Harlan's interest in making convictions final was "an interest that is wholly inapplicable to the capital

sentencing context." *Id.* at 1081 n.3. Justice O'Connor's plurality opinion replied that because Teague was not himself under a death sentence, the Court need not express any opinion "as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context. We do, however, disagree with Justice Stevens's suggestion. . . . As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant." *Id.* at 1077 n.3.[4]

Note three did not gain majority support, since Justice White neither joined it nor otherwise mentioned *Teague's* application to death cases. Justice Brennan's dissenting opinion, joined by Justice Marshall, assumes that the plurality would apply the new limits to death cases, and observes that "the plurality's new rule apparently would not prevent capital defendants . . . from raising Eighth Amendment, due process, and equal protection challenges to capital sentencing procedures on habeas corpus." *Id.* at 1089 n.5.

The *Penry* decision settled *Teague's* application to death cases. In Part II-A of her opinion for a fractured Court, Justice O'Connor, joined by the Chief Justice and Justices White, Scalia, and Kennedy, held that *Teague* did apply to capital cases. The plurality simply observed that the finality concerns underlying the *Teague* doctrine hold equally well in capital cases, and offered no further analysis. The four remaining Justices dissented from the relevant portion of Justice O'Connor's opinion.

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[4] Justice Blackmun joined Justice Stevens's reservations about *Teague's* applicability to death cases.

It remains unclear, however, whether *Teague* necessarily operates as a threshold barrier preempting full analysis of the constitutional claims asserted. The *Teague* plurality clearly thought that a *Teague* bar would preempt discussion of the constitutional merits. 109 S.Ct. at 1069-70, 1077. However, Justices Stevens and Blackmun, who joined the plurality to constitute a majority in favor of Justice Harlan's approach to retroactivity, expressly rejected the plurality's position on this matter. Justice Stevens, joined by Justice Blackmun, contended that the Court should proceed by "first determining whether the trial process violated any of the petitioner's constitutional rights and then deciding whether the petitioner is entitled to relief." Justice Stevens went on to observe that, absent a precise formulation of the rule in question, it may be difficult to determine whether the rule is in fact "new" at all. *Id.* at 1079-80 & n.2. Finally, Justice White once again declined to join the relevant portion of the plurality opinion, leaving unclear his own position on the relation between the constitutional and *Teague* issues.

On this point, *Penry* leaves the matter unclear. A majority did join a portion of Justice O'Connor's opinion which characterized *Teague* as a rule to be applied "as a threshold matter," 109 S.Ct. at ___ (Part II-A). Indeed, in Part IV-A all nine Justices joined a portion of the opinion which included a reference to *Teague* as a threshold test. *Id.* at ___. We must take care, however, not to overstate the significance of these votes. Thus, although Justice Stevens joined Part IV-A of Justice O'Connor's opinion, he reiterated in a separate concurrence his view that the constitutional rule should be articulated before *Teague* is applied. The threshold character of the *Teague* bar was not

the primary topic of Part II-A or Part IV-A, and it would be unwise to assume that each Justice joining those parts intended that *Teague* function as a threshold barrier in every case where it applied.

More importantly, however, Justice O'Connor's own opinion mixed the *Teague* inquiry with the constitutional questions. In order to decide that Penry's requested rule was dictated by precedent, and so not new, she had to decide precisely the substantive question which divided the Justices five-to-four over Part III of her opinion: that is, the question of whether Penry's proposed rule was the best possible interpretation – let alone the interpretation "dictated by" – Supreme Court precedent. 109 S.Ct. at ___ (Part II-B). Likewise, Justice Scalia, dissenting in part and joined by the Chief Justice, Justice White and Justice Kennedy, observed that "[t]he merits of the mitigation issue, and the question of whether, in raising it on habeas, petitioner seeks application of a 'new rule' within the meaning of *Teague*, are obviously interrelated." 109 S.Ct. at ___.

The relationships that led to a mixing of the *Teague* issues and the constitutional issues in *Penry* become all the more powerful when a petitioner attempts not to establish a new rule, but to rely, as Sawyer would like to, upon a rule that is new by comparison to his own conviction yet is well established by the time of his habeas petition. In such a case, a court may have to reach the constitutional questions even to define what the petitioner complains of – in Sawyer's case, for example, "*Caldwell* error." Moreover, the court does not risk the awkward outcome of establishing a new rule in a case where it has no application. *See Teague*, 109 S.Ct. at

1077-78. The rule relied upon – for example, the rule governing *Caldwell* error – exists by the time the *Teague* issues arise in connection with a particular prisoner's petition.

Indeed, Sawyer's argument illustrates the difficulties that may arise from an attempt to separate *Teague* analysis from the substance of the constitutional claims raised. Whether *Caldwell* is a new rule, and whether *Caldwell* is a rule "implicit in the concept of ordered liberty" that implicates factual innocence, both depend in part upon what *Caldwell* means, and, more specifically, upon the relation between *Caldwell* and *Donnelly*. This dependence is made unmistakably clear by Louisiana's briefing of the *Teague* issue, which suggests that *Teague* is no bar to Sawyer's *Caldwell* claim precisely because Sawyer is wrong about the relation between *Caldwell* and *Donnelly*. If the Supreme Court had made clear that *Teague* necessarily bars an inquiry into the merits of the petitioner's constitutional claims, we would perhaps have to resolve the *Teague* issues by a conditional discussion of *Teague*'s application to what Sawyer says *Caldwell* might mean. Such a conjectural analysis of possible rules would, however, entail considerable awkwardness, do nothing to clarify the substantive law, and defeat rather than serve judicial economy – which would be the ostensible goal of any version of *Teague* that preempted some constitutional inquiries.

We thus choose to address the merits of Sawyer's interpretation of *Caldwell* before applying *Teague* to *Caldwell*. We do not mean, however, by adopting this strategy to suggest that *Teague* never bars inquiry into the constitutional merits of a petitioner's claim. It remains possible

that an application of *Teague* to a conjectural rule may be appropriate in cases where the *Teague* issues do not turn, as they do here, upon a highly precise specification of the rule in question. We leave that issue for a case in which it is properly presented, and turn to the merits of the constitutional arguments.

IV

At a general level, *Caldwell*'s import is clear. Regardless of whether the Court moves toward or away from the *McGautha* acceptance of juror discretion, the sentencing jury must continue to feel the weight of responsibility so long as it has responsibility. Lifting the sense of responsibility frustrates the core contribution of the jury and the cardinal justification for its role. For the jury to see itself as advisory when it is not, or to be comforted by a belief that its decision will not have effect unless others make the same decision, is a frustration of the essence of the jury function. It is not surprising then that jury arguments calculated to have that effect have long been condemned by numerous jurisdictions. *See Caldwell*, 105 S.Ct. at 2642 nn.4 & 5. *See also* Mello, *Taking Caldwell v. Mississippi Seriously*, 30 B.C.L. Rev. 283, 305-308 & nn. 100-114 (1989). The decision of the Court in *Caldwell* reflects this reality, insight born more of experience than of empirical study or abstract exposition.

In no way is the importance of *Caldwell* error diminished by the possibility that a state may dispense with the jury's sentencing power in capital cases. *See Spaziano v. Florida*, 104 S.Ct. 3154 (1984). The evil of *Caldwell*-type prosecutorial arguments is not that they divest juries of

their responsibility, but rather that they distort the jury's understanding of a power which it in fact retains. The decision-maker empowered to choose between life and death must not be relieved of the gravity attending that choice. Whether a judge or jury decides the sentence, the responsibility to decide must remain adjoined to the power to decide. It would, of course, be less likely that a prosecutor could mislead a judge, whose own knowledge of the law should overcome any misleading argument. But a judge who misunderstands the sentencing decision in a capital case creates a Constitutional defect no less significant that a jury which misunderstands its decision. *Cf. Hickerson v. Maggio*, 691 F.2d 792, 794-95 (5th Cir. 1982).

The argument between Sawyer and Louisiana does not draw into question these general observations. Sawyer contends that *Caldwell*, recognizing the unique role of the jury in capital sentencing, imposes an especially stringent procedural safeguard by requiring that the defendant receive a new sentencing hearing if the prosecutor's argument had any effect on the jury's perception of its own responsibility. Louisiana concedes the impropriety of prosecutorial argument that misleads the jury as to its role, but contends that the sentencing phase is marred by a constitutional defect only if the prosecutorial argument rendered it "fundamentally unfair." According to Louisiana, *Caldwell* did not establish a "no effect" test for constitutional error, but simply applied *Donnelly's* "fundamental fairness" test to the facts of a sentencing hearing. On this argument, *Caldwell* extends *Donnelly* to punishment proceedings without altering *Donnelly's* rule

by any reaffirmation of *McGautha's* reflections upon jury responsibility.

It is this argument which brought the case before the *en banc* court. To resolve it, we must consider *Caldwell* in some detail. We begin with the facts.

Caldwell killed the owner of a grocery store in the course of a robbery. His lawyers' plea for mercy at the sentencing phase of his capital murder trial rested on his poverty, troubled youth, and character evidence. His lawyers argued

> [E]very life is precious and as long as there's life in the soul of a person, there is hope. There is hope, but life is one thing and death is final. So I implore you to think deeply about this matter. It is his life or death – the decision you're going to have to make, and I implore you to exercise your prerogative to spare the life of Bobby Caldwell. . . . I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution. . . . You are the judges and you will have to decide his fate. It is an awesome responsibility, I know – an awesome responsibility.

Caldwell. 104 S.Ct. at 2637. The argument triggered the following exchanges:

> "ASSISTANT DISTRICT ATTORNEY: Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think its fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know – they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . . "COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.
>
> "ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.
>
> "THE COURT: Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.
>
> "ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so."

Id. at 2637-38. A divided Mississippi Supreme Court affirmed and the Supreme Court granted certiorari. Speaking for the Court, Justice Marshall concluded that

"it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 105 S.Ct. at 2639. He explained that the court's post-*Furman* review of state procedures "has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State." *Id.* at 2640. He then found "specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Id.*

The State proposed three reasons why the prosecutor's argument should not upset the death sentence. The State argued that under *California v. Ramos*, 463 U.S. 992, 1001-06 (1983), it was free to instruct juries in capital cases about appellate processes. In part IV(a) of the *Caldwell* opinion, joined only by Justice Brennan, Justice Blackmun and Justice Stevens, Justice Marshall rejected this argument. He concluded that, unlike in *Ramos*, the argument in *Caldwell* was not relevant to a valid state penological interest and was misleading. In the *Caldwell* plurality's view, appellate review was simply not relevant to the juror's task of determining an appropriate sentence. For that reason, the prosecutor's argument that the jurors should view themselves as only taking a preliminary step in the sentencing determination served no valid state interest. Justice O'Connor's concurring opinion agreed, but refused to read *Ramos* "to imply that the

giving of *nonmisleading* and *accurate* information regarding the jury's role . . . is irrelevant to the sentencing decision." *Id.* at 2646 (O'Connor, concurring; emphasis in original). In her view the prosecutor's argument was impermissible because it misled "in a manner that diminished the jury's sense of responsibility." *Id.*

The Court next rejected the state's contention that the prosecutor's argument was a reasonable response to defense counsel's argument. The Court observed that the prosecutor's reference to appellate review did not respond to defense counsel's suggestion that a sentence of life would be without parole, nor to the defense's religious theme and plea for mercy.

Finally, and most importantly for our purposes, the Court rejected the State's contention that in any event the effect of the prosecutor's argument should be measured by the standard of *Donnelly v. DeChristoforo*, which would judge improper prosecutorial arguments to vitiate a sentencing proceeding only if they rendered the proceedings fundamentally unfair. The Court distinguished *Donnelly* on two grounds. First, the Court pointed out that in *Donnelly* the trial court gave a strong curative instruction to the jury, while in *Caldwell* the judge not only gave no correcting instruction but "stated to the jury that the remarks were proper." *Id.* at 2645. Second, in *Donnelly* the remarks were ambiguous and not focused pointedly upon " 'the principal concern' of our jurisprudence concerning the death penalty, the 'procedure by which the State imposes the death sentence.' " *Id.* (quoting *California v. Ramos*, 463 U.S. at 999).

Justice Rehnquist, joined by Justice White, dissented, contending that when the argument was placed in its full trial setting it "fell far short of telling the jury that it would not be responsible for imposing the death penalty." 105 S.Ct. at 2649 (Rehnquist, J., dissenting). Rather, "the thrust of the prosecutor's argument was that the jury was not *solely* responsible for petitioner's sentence." *Id.* at 2650 (emphasis in original). He observed that under *Ramos* there was nothing wrong with telling a jury that its decision is subject to appellate review, and that the prosecutor did not mislead the jury by suggesting that its decision would be subject to de novo review.

The division between the *Caldwell* majority and the dissenting Justices, like the division between Sawyer's argument and Louisiana's argument, turns in significant part upon the fate of *Donnelly's* "fundamental fairness" formula in capital sentencing proceedings. As we shall see, the effect upon a death sentence of *Caldwell* error and the nature of the inquiry into whether it exists, including the record sources to be examined, are entwined parts of its very definition. That is, what a reviewing court is to look for and how it is to set about judging its effect upon a criminal conviction is part of the definition of *Caldwell* error. Much of the argument here is over the ingredients of the prohibition.

Sawyer, as we have said, argues that *Caldwell* modifies *Donnelly* by mixing in traces of the regard for jury decision-making so powerfully articulated in *McGautha*. Sawyer argues that the prosecutor's argument at the sentencing phase of his trial misled the jury regarding its

role. In particular, he contends that the argument unambiguously told the jury that its role was only to recommend punishment and that others would check their decision, an argument even more pointed than in *Caldwell*. Sawyer maintains that such an argument effectively renders a proceeding fundamentally unfair by definition, and that the standard of *Donnelly* is therefore inapplicable because superfluous [sic]. It follows, he argues, that he is entitled to a new sentencing hearing before a jury properly aware of its responsibility. According to Sawyer, neither a contemporaneous objection nor participation by the trial judge are prerequisites to a *Caldwell* claim. *Caldwell* mandates a new sentencing hearing so long as the court reviewing *Caldwell* error "cannot say that [the prosecutor's statements] had no effect on the sentencing decision." *Caldwell*, 472 U.S. at 328-329. Sawyer says that in *Kirkpatrick v. Blackburn*, 777 F.2d 272, 289-90 (5th Cir. 1985), this court declared that "the no effect test applies to the state's effort to minimize the jury's sense of responsibility, not to every other improper argument." He maintains that the Supreme Court in *Darden v. Wainwright* adopted this court's position holding *Caldwell* applicable in any case where the prosecutor "mislead[s] the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden*, 477 U.S. 168, 184 n.15 (1986).

As already mentioned, Louisiana contends, in essence, that *Caldwell* merely applies *Donnelly* to a case where the combination of prosecutorial and judicial action at a sensitive moment rendered the proceedings especially unfair to the defendant. Louisiana argues that

no new sentencing hearing should be ordered unless we find both that there was *Caldwell* error and that it rendered the trial fundamentally unfair. Pointing to *Darden v. Wainwright*, the State argues that Sawyer must show prosecutorial misconduct that "so infected the trial as to deny due process." *See Darden*, 106 S.Ct. at 2472 (*quoting Donnelly v. DeChristoforo*). Louisiana argues that the due process standard is applicable because the prosecutor's argument, when stripped of non-misleading statements, was not as clear and focused as in *Caldwell*. Louisiana stresses the absence both of any objection by defense counsel and of any signal from the trial judge that might have endorsed the prosecutorial misstatement.

We agree with Sawyer that *Caldwell* must be read in light of *McGautha*. The state cannot resist a conclusion that it improperly diminished a jury's sense of responsibility in its sentencing role with the argument that a jury with such diminished responsibility nonetheless did not render the proceedings fundamentally unfair. *See, e.g., Coleman v. Brown*, 802 F.2d 1227, 1238-41 (10th Cir. 1986), *cert. denied*, 107 S.Ct. 2491 (1987); *see also Campbell v. Kincheloe*, 829 F.2d 1453, 1460-61 (9th Cir. 1987), *cert. denied*, 109 S.Ct. 380 (1988); *Dutton v. Brown*, 812 F.2d 593, 596-97 (10th Cir. 1987) (en banc), *cert. denied*, 108 S.Ct. 116 (1987); *Mann v. Dugger*, 844 F.2d 1446, 1457-58 (11th Cir. 1988) (en banc). *Cf. Hopkinson v. Shillinger*, 866 F.2d 1185, 1226-33 (10th Cir. 1989); *id.* at 1233-38 (Logan, J., dissenting). Once it is accepted that a death sentence by a jury with such a diminished sense of responsibility is "fundamentally incompatible with the Eighth Amendment

requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case" – and the Supreme Court has told us precisely that, *see Darden*, 106 S. Ct. at 2473 n. 15, (1986) – it is apparent that, as Sawyer contends, the *Donnelly* issue of fundamental fairness is subsumed in the threshold question of whether there was *Caldwell* error.

If the state has misled the jury in the manner condemned by *Caldwell*, it can be no answer that the culprit was the prosecutor and not the judge. With either source, the error is the same. Although in *Caldwell* there was an objection and a potent affirmation of the misleading argument by the trial judge, the relevance of these events was to the question of whether the jury was actually misled. In other words, the absence of objection and trial judge participation are highly relevant to the question of whether a jury was misled, but their absence is not determinative as a matter of law of the question of whether the state misled the jury. We do not read the Court's opinion in *Darden* to the contrary.

"To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 109 S.Ct. 1211, 1215 (1989). In short, a prosecutor's statements to the jury accurately describing its role will not support a *Caldwell* claim. At the same time, a statement can be literally true but quite misleading by failing, for example, to disclose information essential to make what was said not misleading. Indeed much of our law of fraud under the Securities Act rests on just such a reality. *See* 17 C.F.R. 240.10b-5(b).

It is suggested that, in spite of these considerations, a willingness to find *Caldwell* error from unobjected to argument by a prosecutor unwisely creates an incentive for defense counsel to not object. After all, an objection may lead to a curative instruction and any appellate point is not lost by remaining silent. The questionable validity of the assumed incentives aside, these concerns as well as the other values that lie behind our usual insistence that error be preserved are not unique to *Caldwell* error. The essence of the doctrine of plain error is that a loss of fundamental rights outweighs the values behind rules insisting upon an objection. More to the point, the decision to entertain claimed constitutional error without a contemporaneous objection belongs in the first instance to the state, when as here, we review a state court conviction. A state may insist upon a contemporaneous objection. And, ordinarily, a federal habeas court is bound by that decision and cannot reach claims of error found by the state to have been waived. *Dugger v. Adams*, 109 S.Ct. at 1215 (1989). In short, whether to insist upon a contemporaneous objection as a matter of orderliness, as distinguished from the question of whether an objection is an element of the constitutional claim itself, is a matter for the state court.

It is suggested that even if the *Caldwell* issue must be addressed because the state reached its merits, a contemporaneous objection is an element of a *Caldwell* claim. We have concluded that a timely objection is an essential element of a claim of racial discrimination in the exercise of preemptory challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986). *Jones v. Butler*, 864 F.2d 348, 369 (5th Cir. 1988) (on petition for rehearing). But the constitutional

rule in *Batson* rests on a change in the requirement of proof from that of *Swain v. Alabama*, 380 U.S. 202 (1965) (insisting upon proof of a pattern of discrimination by prosecutors in cases) to the case specific procedures of *Batson*. *Teague*, 109 S.Ct. at 1066. *Batson* assures an objecting defendant that a prosecutor striking black veniremen will articulate non-racial reasons for its decisions. An objection is plainly central to a *Batson* claim. *Caldwell*, by contrast, rests on "the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' " *Caldwell*, 105 S.Ct. at 2646. It instructs that if the State seeks "to minimize the jury's sense of responsibility for determining the appropriateness of death," and "we cannot say that this effort had no effect on the sentencing decision," then "that decision does not meet the standard of reliability that the Eighth Amendment requires." *Id.* In *Caldwell*, unlike in *Batson*, the constitutional defect – if it exists – is observable and measurable by a reviewing court even absent any objection. We reject the suggested analogy between these two very different doctrines.

In sum, we reject Louisiana's proffered definition of *Caldwell*. We do so after noting that its core is diminishing the responsibility of the jury by misdescribing its role under state law and after rejecting the suggestion that its elements include showings of fundamental unfairness, a contemporaneous objection or trial court participation.

Continuing our definition of *Caldwell* error, we turn to the question of what an appellate court looks to in gauging the state's conduct, and quickly find that the nature of the prohibition takes us a long way toward the

answer. What has been communicated to the jury by the state cannot be disentangled from the total trial scene, and thus that is our terrain. While the prosecutor's argument will often be the natural point of departure, we must turn to the opposing argument and then to instructions of the court, both in its formal charge and in any rulings on objections. The initial focus will be upon the close of the sentencing hearing, yet inquiry may proceed not only to the guilt phase but to jury selection as well. In short, a trial cannot be cabined into distinct segments. As the Supreme Court phrased it: "not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). We conclude that the inquiry is whether under all facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under state law to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere.

While this is inevitably a case-by-case inquiry with a broad terrain to be surveyed, there are a number of events that obviously may loom large and quickly focus the inquiry. First, the trial judge is an extraordinarly [sic] puissant figure. A direct and uncorrected misstatement to the jury that misleads the jury regarding its role will be difficult to salvage. For example, *Caldwell* error was found by the Eleventh Circuit when a trial judge told the jury that he was the ultimate determinant of whether the defendant was sentenced to death. The Circuit reached this conclusion even though the jury's role under Florida law is advisory. *Adams v. Wainwright*, 804 F.2d 1526,

1532-33 (1986), *modified on denial of rehearing*, 816 F.2d 1493 (1987), *rev'd on other grounds, Dugger v. Adams*, 109 S.Ct. 1211 (1989). Second, the absence of objection by competent counsel may suggest that the argument as it played in the courtroom was less pointed than it now reads in the transcript. Third, the argument may take on a different hue when read as a reply to opposing counsel. Fourth, the court may have mitigated the effect of counsel's argument by instructing the jury that the judge is the sole source of the law and that the lawyer's arguments are not evidence. Fifth, veniremen often receive extensive instruction during voir dire. These instructions, as well as the questions and advices of counsel, are also relevant. Finally, through the course of trial the judge may give detailed instructions to the jury about its role. Such familiar instructions are part of the message to the jury and all must be considered. We list these lines of inquiry to explain the scope of inquiry that may be required in review of asserted *Caldwell* error, without suggesting that the list is exhaustive. By definition, it is not and cannot be. Indeed, in some cases the presence or absence of error will be readily determinable solely on the basis of the prosecutor's argument and the trial judge's treatment of it.

V

A

Sawyer's conviction was final at least by 1984 when the Supreme Court denied his petition for certiorari. *See Sawyer v. Louisiana*, 466 U.S. 931 (1984). Because Sawyer wishes to rely on the Court's later decision in *Caldwell*, he

must grapple with the limitation of *Teague*. Sawyer first argues that *Teague* does not bar his argument because *Caldwell* did not announce a new rule, so that the prosecutor's argument was constitutionally infirm measured by the law in place in 1984 when his conviction became final.

The Supreme Court's decision in *Penry*, left the definition of a "new rule" in some doubt. Justice O'Connor reiterated her statement, first presented in *Teague*, that a case "announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government, [or,] to put it differently . . . if the result was not *dictated* by precedent." *Penry*, 109 S.Ct. at ___ (*quoting Teague*, 109 S.Ct. at ___ (plurality opinion). Yet Justice O'Connor's application of this standard led Justice Scalia, joined by three colleagues, to contend that the Court had only given "lip-service" to the *Teague* standard. *Penry*, 109 S.Ct. at ___ (opinion of Scalia, J., dissenting; Part II). Justice Scalia said that "it challenges the imagination to think that today's result is 'dictated' by our prior cases." *Id.* at ___. He went on to say that "[i]f *Teague* does not apply to a claimed 'inherency' as vague and debatable as that in the present case, then it applies only to habeas requests for plain overruling," and went so far as to remark that "[it] is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same term." *Id.* at ___.

Justice Scalia's comments are especially significant because he speaks on behalf of all three Justices who joined Justice O'Connor's plurality opinion in *Teague*, and on behalf of Justice White as well. Yet, Justice Brennan, in his separate *Penry* opinion, apparently does not agree

with Justice Scalia that *Teague* has been gutted. Justice Brennan reiterates his contention, first made in his dissent from *Teague* itself, that the *Teague* rule is an "unprecedented curtailment of the reach of the Great Writ," and accuses the majority of compounding its errors by extending *Teague* to death cases.

Indeed, Justice O'Connor's application in *Penry* of *Teague*'s "new rule" formula may well have turned upon facts which she thought unique to Penry's claims. In Justice O'Connor's view, Penry sought only to compel Texas "to fulfill the assurance upon which [*Jurek v. Texas*, 428 U.S. 262 (1976)] was based: namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence." 109 S.Ct. at ___. Penry's claim rested on the clearly established and specific Constitutional rule that "a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the offense that mitigates against imposing the death penalty." Justice O'Connor concluded that the path from *Jurek* to *Penry* involved the consistent application of an established constitutional rule to, in essence, changes in the facts.

Because of these disagreements about the meaning of the *Teague* test, the Court's opinions in *Teague* and *Penry* do not immediately yield a clearly articulable definition of a "new rule." We must interpret what Justice O'Connor has said by reference to the purposes served by the *Teague*

rule. To undertake that inquiry, we first turn to the complex of concerns now accommodated within federal habeas jurisprudence.

A federal court's role in a habeas attack on a state court conviction is only to review for errors of constitutional magnitude. The Constitution commands us to defer to federalism, and so recognizes that the solemn judgment of a state's highest court enjoys a presumption of validity, which may be overcome only for failure to abide the Constitution itself. The role that remains for federal courts is by no means modest. To the contrary, viewed over the full span of history, it is rather an extraordinary reach for superintending power. Indeed, the first legislation empowering federal courts to issue a writ for state custody did not come until the Habeas Act of 1867. Until the Court's decision in *Brown v. Allen*, 344 U.S. 443 (1953), "federal courts would never consider the merits of a constitutional claim raised on habeas if the petitioner had a fair opportunity to raise his arguments in the original proceeding. . . . "[5] Seen in this light, casting our role as that of a constitutional backstop is hardly a retrenchment, and *Teague*'s reach for finality is modest indeed.

Teague, whether applied to a capital sentence or to a more ordinary case, is by no means a return to the law that preceded *Brown v. Allen*, if indeed it is a turn in that direction at all. *Teague* rather reflects a distinct and basic judgment that, putting aside the cases falling within its two provisos, there is no fundamental unfairness inherent

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[5] *See Mackey v. United States*, 401 U.S. 667, 684 (1971) (Harlan, J., concurring).

in refusing to wield federal power to upset state court convictions and sentences of death arrived at in complete conformity to constitutional standards in place when the convictions became final. Due regard for the constitutional structure of federalism, and the protection it accords to state government, counsels the opposite – that only preservation of constitutional principles justifies the intrusion.

The *Teague* judgment about the federal role acknowledges that neither finality nor federalism will condone constitutional acquiescence in the conviction of persons factually innocent of the crime charged. Our efforts to reduce the risk of convicting an innocent person are evidenced by myriad procedural safeguards and by high requirements of proof. These restrictions reflect a commitment to accurate outcomes so firm that we consciously increase the chance of acquitting guilty persons to reduce the chance of convicting the innocent. It is not surprising, then, that the Supreme Court is fairly unanimous in its view that a state court prisoner can rely upon a fundamental constitutional rule implicating factual innocence even though that rule was not announced until after his conviction became final.

It might nonetheless be contended that the Court's "factual innocence" proviso is not enough to vindicate the rights of prisoners, and that capital cases show particularly well various considerations that compel a narrow formulation of *Teague*'s "new rule" element. One reasoning along these lines might point to the inherent finality of the death penalty, and contend that the benefit of every announced constitutional rule should be given to a prisoner facing this extreme penalty. One might likewise

argue that in habeas petitions challenging a death sentence but not the underlying conviction, the state need not fear that it will have to relitigate issues of innocence and guilt on the basis of stale evidence, and so run the risk of freeing a criminal who would have been convicted by a fair and timely trial. Finally, continuing to reason against finality interests on the basis of concerns unique to death cases, one might argue that in such cases there is no danger that the state's efforts at rehabilitation will lose their focus because of the habeas process; that habeas petitioners succeed more frequently in capital cases than in other cases; and that other factors, external to the habeas system, are responsible for delays in the execution of state prisoners.

Yet unless we suppose a perfectly stable constitutional jurisprudence, it is unclear how finality could ever be achieved if these arguments are accepted at full reach. As the Court made clear in *Penry*, the order of magnitude of punishment is not relevant to *Teague*'s support of finality so long as we except rules implicating factual innocence. The "death is different" argument in this context is little more than an argument against the validity of the punishment itself. As an argument directed to the purposes of *Teague* – the matter now before us – it fails.

Of course, the penalty is different from all others in many respects. We recognize that it is the extreme of punishments when we reserve the punishment for the most extreme of crimes, as we do under our present law. Death sentences, which by their nature aim at retribution or deterrence and not at rehabilitation, obviously do implicate different state purposes than do terms of incarceration. But that the interests are different does not

imply that they are less deserving of federal deference, or that comity concerns are any less important. A state policy predicated upon the certainty of exact retribution, no less than a state policy predicated upon incarceration in a facility designed in part to rehabilitate, suffers when the prospect of punishment is confused by a series of collateral federal attacks.

Indeed, much that is unique about the law controlling death cases is in fact a powerful testament to the need for the finality-serving rules of *Teague*. The constitutionally secured rules announced for death cases by the Supreme Court since *McGautha v. California*, 402 U.S. 183 (1971), have come in such number and with such rapidity that the entire jurisprudence is fairly described as being in a state of flux. During the ten year period ending with the final day of the Supreme Court's 1988 term, it granted plenary review in sixty-seven cases and at least thirty-five of those can, with little dissent, be described as presenting issues of substantial reach. The destabilizing impact of such a sea-change in controlling law presents problems of administration unique to death cases. In the 1986 term alone, the Supreme Court acted on eighty requests for stay of execution. This undermines the argument that *Teague* has no application to death cases.

Nor is there anything inhumane in an insistence that a death-sentenced state prisoner confine his attack upon that sentence to the rules in effect when his conviction became final. So long as nothing new implicates the petitioner's factual innocence, we, confronted with the need for sureness of punishment as contrasted with the never ending uncertainty and serendipitous state of a nigh open set of rules, see little to persuade us that respect for

human dignity counsels against application of finality rules.

In light of the powerful reasons that justify the *Teague* doctrine, we see no cause to limit its application to the rare or extraordinary case. When a rule is indeed *dictated* by precedent – a word Justice O'Connor took care to emphasize in *Penry* as she did in *Teague* – then a state can reasonably be asked to anticipate its articulation, and enforcing the rule in a habeas proceeding will not intrude upon the state's legitimate interest in the finality of convictions. Otherwise, however, *Teague* must bar the rule's application. We do not, despite Justice Scalia's strong words in dissent, read *Penry* to the contrary. Instead, we believe that Justice O'Connor regarded *Penry* as a special case, one simply reapplying the rule of *Jurek v. Texas*, 428 U.S. 262 (1976) to a unique development in state law. *See Penry*, 109 S.Ct. at ___ (Opinion of O'Connor, J., Part II-B, discussing *Jurek*). Justice O'Connor honored the language of the *Teague* opinion, and we must assume she intended to honor its spirit as well.

B

Sawyer correctly observes that many state courts, including Louisiana, had before *Caldwell* developed common law rules forbidding misleading jury argument about the importance of the jury's decision. *See, e.g., Pait v. State*, 112 So.2d 380, 383-84 (Fla. 1959); *Blackwell v. State*, 79 So. 731, 731, 735-736 (Fla. 1918); *Wiley v. State*, 449 So.2d 756, 762 (Miss. 1984); *State v. Jones*, 251 S.E.2d 425, 427-29 (N.C. 1979); *State v. Gilbert*, 258 S.E.2d 890, 894 (S.C. 1979); *Hawes v. State*, 240 S.E.2d 833, 839 (Ga. 1977);

People v. Morse, 388 P.2d 33, 43-44 (Cal. 1964); *State v. Mount*, 152 A.2d 343, 35152 (N.J. 1959); *People v. Johnson*, 30 N.E.2d 465, 467 (N.Y. 1940). For example, the Louisiana Supreme Court ordered a new sentencing hearing in a 1982 capital case when, without objection, the prosecutor argued to the jury that the "buck" started with them and did not end there, and that "everything" will more than likely be reviewed by every appeals court in the United States. *State v. Willie*, 410 So.2d 1019, 1034-35 (La. 1982). But it does not necessarily follow from the circumstance that Louisiana law forbade the argument made by Sawyer's prosecutor when it was made, that the Supreme Court did not announce a "new" rule in *Caldwell*.

Sawyer's argument fails to deal with *Teague*'s explicit offer of *Ford v. Wainwright*, 477 U.S. 399 (1986), as an example of a decision that created a "new rule." *Ford* held that the Eighth Amendment prohibits states from inflicting the penalty of death on an insane prisoner. Execution of the insane was prohibited at common law. Indeed, the *Ford* Court observed that "[t]he bar against executing a prisoner who has lost his sanity bears impressive historical credentials . . . " 477 U.S. at 406. Moreover, twenty-six states of the forty-one with a death penalty had "statutes explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence." *Id.* at 408, n.2. Sawyer's reliance upon *Caldwell*'s common law roots and its relationship to the rules of several states, including Louisiana, cannot be squared with the Supreme Court's view that it created a new rule in *Ford v. Wainwright*.

There was no federal jurisdiction over Sawyer's present claim until this type of error gained a constitutional

footing. *Caldwell* was certainly new in its conclusion that such arguments violated the Eighth Amendment. *See* Mello, 30 B.C.L. Rev. at 305. Of course, when Sawyer's conviction became final, *Donnelly* would have authorized federal jurisdiction over a habeas petition attacking the sentence on due process grounds. Yet, as we have seen, Sawyer persuasively contends that *Caldwell* was more than a straightforward application of *Donnelly* to new facts. Our question is then whether these changes suffice to make *Caldwell* a new rule within the meaning of *Teague*.

The *Teague* court held that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [t]o put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 109 S.Ct. at 1070 (emphasis in original). *Accord*, *Penry*, 109 S.Ct. at ___. We have little difficulty in concluding that so measured, *Caldwell*'s greatly heightened intolerance of misleading jury argument is a new rule within the meaning of *Teague*. Its direct impact upon the finality of state convictions is illustrated by this case.

Sawyer, however, nonetheless contends that this heightened standard for review of prosecutorial argument does not create a new rule. He has two arguments. First, Sawyer says that Louisiana not only condemned *Caldwell*-type prosecutorial argument, but did so under an Eighth Amendment standard identical to the *Caldwell* standard. For this proposition, Sawyer cites a string of Louisiana cases explaining that Louisiana's death penalty procedures were designed to comply with the Supreme Court's Eighth Amendment decisions, *see, e.g., State v.*

Payton, 361 So.23 866, 870-73 (La. 1978), *State v. Sonnier*, 379 So.2d 1336, 1370 (La. 1980), and *State v. Willie*, 410 So.2d 1019, 1032-33 (La. 1982), and another string of Louisiana cases condemning *Caldwell*-type prosecutorial arguments, *see, e.g., State v. Berry*, 391 So.2d 406, 418 (La. 1980), *cert. denied*, 102 S.Ct. 1986 (1982), *Willie*, 410 So.2d at 1034-35, and *State v. Robinson*, 421 So.2d 229, 231-34 (1982).

Yet it is one thing to say that a state, inspired by earlier constitutional decisions, had anticipated *Caldwell* as a matter of state law, and a very different matter to say that the state had recognized a *Caldwell*-type rule as a constitutional restriction on its own power. In an effort to bring the Louisiana cases within the latter category, Sawyer relies heavily on the Louisiana Supreme Court's recent post-Caldwell decision in State ex rel. Busby v. Butler, 538 So.2d 164, 173 (La. 1988). There, the Louisiana Court said it need not consider a Caldwell claim on collateral attack after rejecting a similar state law challenge on direct review, for Caldwell "did not change our previous case law." Again, however, this statement and the other remarks in Busby indicate only that the state law and Caldwell rules are coincident. The remarks do not show that Louisiana law condemned Caldwell argument because it regarded such argument as an Eighth Amendment violation. We therefore need not decide whether, if a rule is "new" as a matter of constitutional interpretation but not "new" in state interpretations of the federal Constitution, it is nonetheless "new" for purposes of the Teague bar upon collateral federal challenges to state convictions.

Sawyer next contends that this Circuit in *Moore v. Blackburn*, 774 F.2d 97, 98 (5th Cir. 1985), cert. denied, 106 S.Ct. 1904 (1986), has already decided that Caldwell is not a new rule. In Moore, we held that even if the Caldwell standard were separable from the Louisiana state standard for assessing prosecutorial argument, petitioner Moore should have anticipated in an earlier habeas petition the possibility of a distinct constitutional standard. We therefore held that Moore's Caldwell argument was not "new" for purposes of the writ abuse doctrine, and stated that the doctrine would bar the argument. Sawyer's attempt to rely on Moore must fail, for the meaning of "newness" differs in writ abuse cases from its meaning in Teague cases. In writ abuse cases, the key question is whether a particular argument is being made by attorneys: the argument is not "new" if it is being made, and so should be known to attorneys. The Supreme Court makes clear, however that a rule is new for purposes of Teague if it has not been accepted at the time the petitioner's conviction became final. Teague, 109 S.Ct. at 1070. Moore thus cannot bear the freight Sawyer would put on it.

C

The *Teague* test allows two exceptions. Sawyer, however, cannot contend that the sentence imposed upon him was unlawful because the conduct for which he was charged is constitutionally privileged, or that he is among a class of persons protected against execution. He contends only that the state's sentencing procedure was unconstitutionally administered. *Teague*'s first exception,

dealing with substantive limitations upon the criminal law-making authority, therefore does not apply.

We turn, then, to the plurality's insistence in *Teague* that a new rule may be relied upon by a habeas petitioner if it both "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty" and "procedures without which the likelihood of an accurate conviction is seriously diminished." Sawyer contends that we should not in his case apply the "accurate conviction" qualification to Harlan's proviso. First, Sawyer argues that the qualification is only a plurality view. The *Penry* opinions did not discuss the "fundamental to ordered liberty" proviso, or the "actual innocence" qualification to it. However, Justice White's joinder in Justice Scalia's dissent, and in Part II-A of Justice O'Connor's opinion (which references the *Teague* plurality's formulation of the exceptions), strongly suggests that Justice White has adopted the position of the *Teague* plurality. In any event, our short answer is that pending further direction from the Supreme Court, and in particular the full view of Justice White, we should follow the course set by the plurality as best we can.

Second, Sawyer argues that confining use of new rules to those implicating factual innocence has no relevance to a jury's decision to impose a death and not a life sentence. We are not persuaded. A habeas petitioner may not escape this limitation on use of a new rule by confining his attack to the jury's decision to impose a death rather than life sentence. Rather, such a petitioner must show that the new rule insists on procedures without which the correctness of the jury's decision to punish by

death rather than by life imprisonment is seriously diminished.

We thus accept the plurality's formulation of the proviso, and turn to its application. Our task is made difficult by the newness of the amalgam of the second proviso as well as its uncertain precedential footing. Justice O'Connor's opinion for the plurality insisted that it is "unlikely that many such components of basic due process have yet to emerge." 109 S.Ct. at 1077. Justice O'Connor went on to say that these components are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus – that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods" (citations omitted). The new rule contended for in *Teague* was an extension to petit juries of the fair cross section requirement of a jury venire. The plurality opinion concluded that such a new rule "would not be a 'bedrock procedural element' that would be retroactively applied under the second exception. . . . " Id. at 1077.

While the Court has made plain that it expects to encounter few newly discovered bedrock procedural rules, it is not clear how *Caldwell*, with its condemnation of a particular type of jury argument, fits into the *Teague* scheme. This difficulty stems in part from uncertainty about *Teague*'s standard for sorting the bedrock from the host of other rules calculated to enhance the efficiency and fairness of a trial. We can immediately put aside rules that only enhance as distinguished from rules essential to

fundamental fairness. This first cut is informed by developed principles of incorporation doctrine that leave the states free of all but the core assurances, variously expressed as rejecting "tail with the hide" and "jot-for-jot" incorporation. *See e.g., Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting). For example, the Fourteenth Amendment requires Louisiana to provide Sawyer a jury and a fundamentally fair trial. Louisiana has wide latitude in its choice of procedures for doing so and few procedures are so essential as to be required by the Fourteenth Amendment. This distinction is reflected in our willingness to find errors to be harmless and our refusal to grant relief absent a demonstration not only that the rule was violated but also that its violation rendered a trial fundamentally unfair.

Caldwell manifestly implicates two principles that would be fundamental in the sense required by *Teague's* second proviso. The first is *Donnelly's* restriction requiring that a proceeding not be "fundamentally unfair" to the defendant. The second is the more expansive regard for jury discretion suggested by *McGautha*, a regard trimmed back, as we have mentioned, by the Court's later interpretations of the Eighth Amendment. Were Sawyer seeking to rely on either of these principles as new rules, his argument would be compelling. Yet *Donnelly's* principle is not new by comparison to Sawyer's conviction, and *McGautha's* general themes do not constitute a rule at all. What Sawyer seeks to rely upon is *Caidwell's* modification of *Donnelly* in light of the ideals discussed in *McGautha*. That modification is not itself so fundamental as to be "implicit in the concept of ordered liberty." After all, the only defendants who need to rely on *Caldwell* rather than

Donnelly are those who must concede that the prosecutorial argument in their case was not so harmful as to render their sentencing trial "fundamentally unfair."

A recent decision of the Supreme Court supplies additional guidance for our inquiry. In *Dugger v. Adams*, the Court decided whether Florida's procedural default rule barred Adams's *Caldwell* claim. To resolve that issue, the Court had to determine whether a "fundamental miscarriage of justice" would result if the procedural default rule were permitted to defeat Adams's *Caldwell* claim. The Court held that no such miscarriage of justice would arise.

In reaching its conclusion, the *Adams* Court wrote as follows:

> The dissent "assumes *arguendo*" that a fundamental miscarriage of justice results whenever "there is a substantial claim that the constitutional violation undermined the accuracy of the sentencing decision." . . . According to the dissent, since "the very essence of a *Caldwell* claim is that the accuracy of the sentencing determination has been unconstitutionally undermined," . . . the standard for showing a fundamental miscarriage of justice is necessarily satisfied. We reject this overbroad view. Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the "extraordinary case," . . . into an all too ordinary one.

109 S.Ct. at 1217-18 & n.6.

Adams, of course, does not directly control *Teague's* application to a *Caldwell* claim. *Adams* applies a "fundamental miscarriage of justice" standard to determine whether a *Caldwell* claim might fit within an exception to the procedural default rule. *Teague* applies an "implicit in the concept of ordered liberty" and "implicating factual innocence" standard to determine whether a *Caldwell* claim might fit within an exception to the doctrine barring habeas petitioners from relying on new rules. The verbal formulae are different, and their application thus might differ, too. Moreover, the *Adams* miscarriage standard requires scrutiny of the facts of a particular case, while the *Teague* ordered liberty standard looks to the character of the general rule asserted.

Nonetheless, we must take care not to exaggerate the substantive import of these semantic differences. Similar concerns underlie both the procedural default doctrine and the *Teague* doctrine prohibiting reliance upon new rules. Both doctrines recognize the importance of finality in criminal convictions. Both doctrines promote federal-state comity by requiring federal courts to defer to the integrity of state convictions. And both doctrines put a premium upon the obligation of defendants to raise all relevant arguments before their convictions become final. Indeed, in some respects *Teague* functions as a radical extension of the procedural default rule by forcing defendants to establish a new rule on direct appeal, rather than on collateral attack, if they wish to rely on such a rule. Because of the similarities between the two doctrines, it is difficult to see why a *Caldwell* violation should be sufficiently fundamental to require an exception to the "new

rule" doctrine, but not so fundamental as to require an exception to the procedural default doctrine.

Adams is also important for another reason: given the particular facts of Adams's own case, the Court's disposition of the case presupposes a judgment about the importance of *Caldwell* error to a sentencing determination. In *Adams*, as the Court noted, the trial judge "found an equal number of aggravating and mitigating circumstances." The Court made clear that there was no fundamental miscarriage of justice even though *Caldwell* error goes to the accuracy of the sentencing procedure, and even though the case was a close one. In short, the mere possibility of a close case did not make the alleged error's threat to accuracy sufficiently fundamental to warrant exemption from the procedural bar.

Sawyer's *Caldwell* claim runs into comparable problems when analyzed in light of the second *Teague* proviso. Sawyer can argue at most that there would be a possibility, absent the alleged *Caldwell* violation, of a different outcome to the jury's sentencing procedure. Yet, as we have already stated, the Court's *Teague* opinion makes quite clear that not every procedural rule affecting the accuracy of a trial will fit within the "ordered liberty" proviso. To hold otherwise would be to cling to "jot-for-jot" or "tail-with-the-hide" incorporation, and to make the "extraordinary case into the ordinary one." Instead, the examples listed by the *Teague* Court – trial by mob rule, use of perjured testimony, or the extraction of confessions through brutal torture – either so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact's

disposition of the case. Here the jury did have an opportunity, even if procedurally flawed, to contemplate and review the relevant evidence. Sawyer's *Caldwell* claim has neither the overwhelming influence upon accuracy nor the intimate connection with factual innocence demanded by the second *Teague* proviso.

Our extended exposition of the nature of *Caldwell* error reinforces the inferences we draw from the Supreme Court's decision in *Adams*. *Caldwell* error does indeed implicate core aspects of the sentencing procedure. As such, it implicates both the integrity of that procedure and the accuracy of the determination in any particular case. Yet to say that accuracy is implicated is not to say that the defendant is necessarily prejudiced. In fact, *Caldwell's* deference to the fundamental character of the jury's role manifests itself precisely in its refusal to require actual prejudice to the defendant. *Caldwell* views prosecutorial argument as a basis for reversal if, when viewed within the context of the whole, it had an effect upon the jury's perception of its role in the sentencing proceeding. It is, of course, unusual to presume the existence of reversible error, on the basis of the prosecutor's comments, absent any showing of prejudice. This presumption is an important one, and, we would hope, will contribute to the increased integrity and accuracy of criminal procedure in this sensitive area. But none of this makes *Caldwell* so fundamental, or so connected with factual innocence, as to fit within *Teague's* second proviso.

VI

Of course, if Sawyer were able to show actual prejudice, he would be able to proceed under the more general

fundamental fairness standard of *Donnelly v. DeChristoforo*. Yet Sawyer has not contended that such prejudice exists here, and we, after a thorough review of the record, can find none.

We have covered considerable ground about the content of the *Caldwell* rule. Yet, the dissent falls silent on this set of issues, perhaps because the posture of the case does not require that we apply *Caldwell*. It is then only on narrow, but crucial grounds, that our opinion is engaged, and to assist its focus we conclude with one observation in reply to the dissenting view.

Judicial tradition demands that new rules find their trace in older ones. This search is near the core of discipline that distinguishes judges from other decision makers. Judges excel at the task. Such artisans possess a very important tool – a gauge of generality. It is no surprise then that Teague's effort to limit federal habeas by asking whether a rule is new invites those who resist the restriction to reach for their tool kit. At a sufficient level of abstraction there are no new rules. The judicial artisan can start by asserting that the old rule is that a trial must be fundamentally fair, that a defendant is entitled to procedural due process. Stated this generally there have been few if any new rules for the trial of criminal cases.

The dissent does precisely this, resting its assertions on little more than that the old rule is the prohibition of unfair jury argument. Its old law is unnarrowed by any definition of its reach and force such as whether it treats such state conduct as inherently destructive of required fairness or insists on demonstrated prejudice in a given

case. Louisiana rejected Sawyer's claim and Sawyer has no federal habeas claim without *Caldwell*. Nonetheless, we are told that *Caldwell* was dictated by precedent, that it broke no new ground and that it imposed no new obligation on the states. We are asked to believe that *Caldwell* simply applied well established constitutional principles. If to the uninitiated this is dissemblance, unhappily it is to the cognoscenti business as usual. By adroit use of the generality gauge our able dissenting colleagues can breathe superficial credibility into the fable that *Caldwell* broke no new ground, imposed no new obligation on the states and was dictated by precedent. With all deference, there is afoot here no more than a resistance to the principles of finality adopted by *Teague*. We should not play such sophistical games. The issue here is whether the federal judiciary will take hold of the open ended character of the habeas remedy it has created. We are persuaded that little or nothing is left of *Teague's* promise if the dissent's view is accepted. We think that this artisan's destruction of so recent a decision by the Supreme Court should be rejected and we do so. Ultimately only *Teague's* authors can tell us if they meant what they said or if they have changed their minds.

For these reasons, we find that *Teague* bars Sawyer from pursuing his *Caldwell* claim. We affirm the district court's decision denying Sawyer's petition for a writ of habeas corpus.

KING, Circuit Judge, with whom REAVLEY, POLITZ, JOHNSON, and WILLIAMS, Circuit Judges, join dissenting:

Sawyer has been found guilty of capital murder. He does not contest his guilt. The only issue before the en banc court is whether he is entitled to have a properly instructed jury determine that he should be executed by the State or spend the rest of his life in jail, without the benefit of probation or parole.[1] Whatever we decide, he will not be set free.

The majority has rejected the interpretation of Caldwell v. Mississippi[2] on which the State relied in urging that we deny Sawyer's petition for habeas relief. The majority concludes, however, that the State may execute Sawyer, regardless of the merits of his *Caldwell* claim, because *Caldwell* established a "new rule" in constitutional law and, under the Supreme Court's recent decision in Teague v. Lane,[3] Sawyer may not receive the benefit of its application because his conviction became final before *Caldwell* was decided.

If, as the majority admits, "it is not clear how *Caldwell* . . . fits into the *Teague* scheme" because of the "newness of the amalgam" of standards *Teague* set on "uncertain precedential footing," we do not see why it is incumbent on us to condemn Sawyer to die instead of ordering the State to put the life-or-death issue to a jury that is not only not misled but is fully informed of its responsibilities. In contrast to the majority's ambivalence, we harbor no doubt that Sawyer is entitled to the

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[1] *See* La. Rev. Stat. Ann. 14:30(C) (1980).

[2] 472 U.S. 320, 105 S.Ct. 2633 (1985).

[3] ___ U.S. ___, 109 S.Ct. 1060 (1989).

constitutional protections guaranteed by the eighth amendment: *Caldwell* did not establish a "new rule," and even if it did, *Teague* requires its retroactive application. We, therefore, respectfully dissent.

I.

Although the majority opinion contains a lengthy exegesis on the role of the jury and the nature of *Caldwell* error, it does not reach the merits of Sawyer's claim. We would find that on the facts of Sawyer's case, his sentence is invalid under *Caldwell*. The prosecutor, in describing the jury's role, remarked:

> The law provides that if you find one of these circumstances then *what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States,* that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct *are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty. It is merely a recommendation* so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those [sic] type of decision but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I

> wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision (emphasis supplied).

The prosecutor went on to describe the brutal nature of the crime and, briefly, its impact on the victim and her mother. Then, once again turning to the function of the jury, the prosecutor stated:

> There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day,* is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. *All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less* (emphasis supplied).

Finally, after arguing that a death penalty would be justified in this case, the prosecutor noted:

> It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and *if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong* so I ask that you do have the courage of your convictions (emphasis supplied).

The prosecutor's arguments in Sawyer's case fall squarely within *Caldwell's* prohibition of misleading and inaccurate arguments regarding appellate review that seek to diminish the jury's sense of its responsibility in capital sentencing. The trial court did not correct these statements, and because we cannot say that these comments had no effect on the jury's decision, we would vacate Sawyer's sentence and grant him a new sentencing hearing.[4]

II.

Whether Sawyer may receive the benefit of the constitutional protection enunciated in *Caldwell* depends, however, on the threshold determination that *Caldwell* established a "new rule." Conceding that "[i]t is . . . often difficult to determine when a case announces a new rule," the plurality in *Teague* nevertheless offered the following explanation: "In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new rule if the result is not *dictated* by precedent existing at the time the defendant's conviction became final."[5]

The plurality recognized that constitutional rules will fall along a "spectrum" – from those that fit neatly within the rubric of settled law to those that constitute a clear

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[4] *See Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646

[5] *Id.* at ___, 109 S.Ct. at 1070 (O'Connor, J., plurality opinion) (emphasis in original) (citations omitted).

break from prior precedent – but provided little additional guidance for determining at *which* point a rule is not "dictated" by precedent and, therefore, "new" for retroactivity purposes.[6]

In Penry v. Lynaugh,[7] however, the Court began to elaborate the meaning of the term "new rule." The Court held that although it had previously found the Texas sentencing scheme facially valid,[8] the scheme, as applied to Penry, unconstitutionally limited the jury's ability to consider certain, relevant mitigating evidence.[9] The Court held that this determination did not constitute a "new rule" given the requirement that capital sentencing procedures permit the sentencing jury to consider and give effect to all relevant mitigating evidence.[10]

The Court reasoned that a rule is not "new" for purposes of retroactivity analysis when it "fulfill[s] the assurance" upon which a previous case "was based," or merely "interpret[s] broadly" that previous case.[11] The Court thus made clear that its "*dictated* by precedent" language was not intended to categorize as "new" every rule that does not fit precisely within the pattern of a previously decided case. Rather, the Court recognized

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[6] *See ibid.*

[7] ___ U.S. ___, ___ S.Ct. ___, 57 U.S.L.W. 4958 (June 26, 1989).

[8] *See* Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2951 (1976).

[9] *Penry*, 57 U.S.L.W. at 4965.

[10] *Id.* at 4961-62; *see* Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982).

[11] *Penry*, 57 U.S.L.W. at 4961.

that the process of constitutional interpretation routinely requires courts to articulate extant law and apply established principles of law to different facts and in different contexts. Rules that are the product of this gradual process of refining and developing doctrine are not "new." To define "new" rules more broadly would depart significantly from the traditional understanding of constitutional jurisprudence as an evolving body of principles rather than jarring series of revolutionary pronouncements.[12]

This differentiation between elaborating and applying established principles, on the one hand, and announcing new rules that are dissonant with prior understandings of the law, on the other hand, derives directly from Justice Harlan's view of retroactivity that the Court adopted in *Teague* and applied in *Penry*. Justice Harlan observed "that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles . . . whose meanings are altered slowly and subtly as generation succeeds generation."[13] He reasoned that such rules are not "new" and should be

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[12] *See* Yates v. Aiken, 484 U.S. ___, ___, 108 S.Ct. 534, 538 (1988); Truesdale v. Aiken, ___ U.S. ___, 107 S.Ct. 1394 (1987); Griffith v. Kentucky, U.S. ___, ___, 107 S.Ct. 708, 714 (1987); Allen v. Hardy, ___ U.S. ___, ___, 106 S.Ct. 2878, 2880 (1986); Shea v. Louisiana, 470 U.S. 51, 57, 105 S.Ct. 1065, 1068 (1985); United States v. Johnson, 457 U.S. 537, 549-50, 102 S.Ct. 2578, 2586-87 (1982); Solem v. Stumes, 465 U.S. 638, 662, 104 S.Ct. 1338, 1352 (1984) (Stevens, J., dissenting); *see also* Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U.Chi.L.R. 719, 749-54 (1966).

[13] Desist v. United States, 394 U.S. 244, 263, 89 S.Ct. 1030, 1041 (1969) (Harlan, J., dissenting).

given retroactive application in habeas proceedings because "one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final."[14]

Caldwell held that a prosecutor may not "le[a]d" a jury to "believe" that it is not "responsib[le] for determining the appropriateness of [a] defendant's death."[15] The Court based this rule upon its belief that such prosecutorial misconduct "was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability' " in capital sentencing, and that such conduct, "if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment."[16] Arguments that seek to diminish the jury's sense of responsibility, the Court explained, undermine core eighth amendment values:

> The "delegation" of sentencing responsibility that the prosecutor here encouraged . . . would deprive [the defendant] of . . . [the] right to a fair determination of the appropriateness of his death . . . , for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination,

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[14] *Id.* at 264, 89 S.Ct. at 1041.

[15] *Caldwell*, 472 U.S. at 329, 105 S.Ct. at 2639.

[16] *Id.* at 340, 105 S.Ct. at 2645 (footnote omitted) (quoting Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 (1978) (Stewart, J., plurality opinion)); *see* Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974).

> few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed "(those) compassionate or mitigating factors stemming from the diverse frailties of humankind."[17]

Far from articulating an unanticipated principle of law or breaking with a past understanding of the law, *Caldwell* interpreted and followed directly the Court's own eighth amendment jurisprudence. The *Caldwell* Court fulfilled the assurance enunciated in Furman v. Georgia[18] and Gregg v. Georgia[19] that capital punishment not be administered "wantonly" or "freakishly" or in an "arbitrary and capricious manner;"[20] it applied the "need for reliability in the determination that death is the appropriate punishment in a specific case," assured in Woodson v. North Carolina,[21] Lockett v. Ohio,[22] and Eddings v. Oklahoma,[23] to a situation in which that

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[17] *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640 (quoting *Woodson*, 428 U.S. at 304, 96 S.Ct. at 2991 (Stewart, J., plurality opinion)).

[18] 408 U.S. 238, 92 S.Ct. 2726 (1972).

[19] 428 U.S. 262, 96 S.Ct. 2950 (1976).

[20] *Gregg*, 428 U.S. at 188, 96 S.Ct. at 2932 (Stewart, J., plurality opinion) (citing *Furman*, 408 U.S. at 310, 92 S.Ct. at 2763 (Stewart, J., concurring)).

[21] 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 (1978) (Stewart, J., plurality opinion);

[22] 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65 (1978) (Burger, C.J., plurality opinion).

[23] 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77 (1982).

reliability was compromised; it fulfilled the promise of *Woodson*, *Lockett*, and *Eddings* that a defendant be sentenced to death only after an individualized determination of his moral culpability;[24] and it applied the need first articulated in McGautha v. California[25] that jurors be "confronted with the truly awesome responsibility of decreeing death for a fellow human"[26] to a case in which the prosecutor specifically instructed the jury that it had no such responsibility. With due respect to the three dissenters in *Caldwell*, it is difficult to imagine the Court reaching any other conclusion given these precedents.

There was, moreover, no precedent inconsistent or dissonant with *Caldwell* at the time it was decided. While the Court, in Donnelly v. DeChristoforo,[27] had imposed a more stringent due-process test for claims of improper argument made at the guilt/innocence phase of trial, this analysis applied neither to improper argument at sentencing proceedings nor to argument implicating "specific guarantees of the Bill of Rights."[28] The *Donnelly* Court thus left open the possibility that improper arguments at sentencing not violative of the Due Process Clause may

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[24] *See Woodson*, 428 U.S. at 305, 96 S.Ct. at 2991 (Stewart, J., plurality opinion); *Lockett*, 438 U.S. at 601-05, 98 S.Ct. at 2963-65 (Burger, C.J., plurality opinion); *Eddings*, 455 U.S. at 112-15, 102 S.Ct. at 875-77; *see also* Stanford v. Kentucky, ___ U.S. ___, ___ S.Ct. ___ (1989) (O'Connor, J., concurring); South Carolina v. Gathers, ___ U.S. ___, ___ S.Ct. ___ (1989).

[25] 402 U.S. 183, 91 S.Ct. 1454 (1971).

[26] *Id.* at 208, 91 S.Ct. at 1467.

[27] 416 U.S. 637, 94 S.Ct. 1868 (1974).

[28] *Id.* at 643, 94 S.Ct. at 1871.

be held to contravene the eighth amendment's requirements.

Similarly, in California v. Ramos,[29] the Court posited its approval of jury instructions containing information regarding postconviction procedures on the fact that the information was both relevant and accurate.[30] While the Court in *Ramos* did not address whether a prosecutor violates the Constitution by presenting irrelevant and misleading information concerning post-conviction proceedings, its emphasis on the nature of the instruction forecast that such information would be found to undermine the reliability of the sentencing process by injecting into it an arbitrary factor in violation of the eighth amendment.[31]

If, as the Court in *Penry* instructed, we should consider a case "dictated by precedent" and not "new" for retroactivity purposes when it "fulfill[s] the assurance[s]" of or "interpret[s] broadly" principles articulated in a previous case,[32] it is difficult to see how the majority may conclude that *Caldwell* announced a "new rule." *Caldwell* fulfilled the assurance of and interpreted faithfully the settled principle in eighth amendment jurisprudence that a verdict of death must rest upon the reliable determination of a jury accurately informed of its "awesome

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[29] 463 U.S. 992, 103 S.Ct. 3446 (1983).

[30] *Id.* at 1004, 1009, 1012, 103 S.Ct. at 3455, 3457, 3459.

[31] *See Caldwell*, 472 U.S. at 342-43, 105 S.Ct. at 2646-47 (O'Connor, J., concurring in part and concurring in the judgment) (citing *Ramos*, 463 U.S. at 999, 1010, 103 S.Ct. at 3451, 3458).

[32] *Penry*, 57 U.S.L.W. at 4961.

responsibility;" the same line of eighth amendment cases that compelled the result in *Penry* thus compelled the result in *Caldwell*.

The majority contends that the foregoing analysis unduly restricts the scope of *Teague*. Its criticism of our interpretive method is misdirected, however, for the majority's dispute is not, in reality, with *our* interpretation of *Teague*, but with *Penry's* elaboration of the "new rule" standard set forth in *Teague*. Indeed, the majority's criticism of our analysis echoes precisely Justice Scalia's dissent in *Penry*.[33] In admonishing us to wait for "*Teague's* authors [to] . . . tell us if they meant what they said," the majority ignores the fact that *Teague's* authors have already spoken in *Penry* and have effectively rejected any definition of a "new rule" that would sweep broadly enough to encompass *Caldwell*.

If anything, Sawyer's claim that *Caldwell* followed eighth amendment jurisprudence consistently is stronger than Penry's, for no precedent like *Jurek* existed in the *Caldwell* context to lead state courts to reach a conclusion different from the Supreme Court's holding in *Caldwell*. Indeed, the Court in *Caldwell* observed that after *Furman*, several state supreme courts – including Louisiana's – had anticipated *Caldwell* and found that *Caldwell*-type errors undermined the validity of a death sentence;[34] it

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[33] *Id.* at 4971.

[34] *Caldwell*, 472 U.S. at 333-34 & n. 4, 105 S.Ct. at 2642 & n. 4 (citing cases).

noted that some state courts had prohibited such arguments in both capital and noncapital cases even before *Furman*.[35]

At least five years before the Supreme Court decided *Caldwell*, the Louisiana Supreme Court held that arguments that diluted the jury's sense of responsibility for imposing a capital sentence injected an arbitrary factor into the jury's decision and invalidated the sentence. In 1980, when denying an application for rehearing in State v. Berry,[36] the Louisiana Supreme Court recognized

> [a]ny prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error. If the reference conveys the message that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, . . . then the defendant has not had a *fair trial* in the sentencing phase, and the penalty should be vacated. . . . The issue should be determined in each individual case by viewing such a reference to appellate review in the context in which the remark was made.[37]

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[35] *Id.* at 334 & n. 5, 105 S.Ct. at 2642 & n. 5 (citing cases).

[36] 391 So.2d 406 (La. 1980) (denial of application for rehearing), *cert. denied*, 451 U.S. 1010 (1981).

[37] *Berry*, 391 So.2d at 418 (emphasis in original) (portions of text omitted); *see id.* at 419-21 (Calogero, J., dissenting from denial of rehearing); State ex rel. Williams v. Blackburn, 396 So.2d 1249, 1250 (La. 1981) (Dennis, J., dissenting from denial of stay); *id.* at 1250 (Calogero, J., concurring in denial of the stay); State v. Monroe, 397 So.2d 1258, 1270 (La. 1981), *cert. denied*, 463 U.S. 1229 (1983).

In 1982, in State v. Willie,[38] the State Supreme Court vacated a death sentence and remanded for a new sentencing hearing when the prosecutor referred to appellate review and told the jury that "the buck really don't [sic] stop with you. The buck starts with you. . . . [W]hat I'm asking you to do is start the buck rolling."[39] The court quoted *Berry*, and added:

> This type of argument may not be made in a criminal case in which the punishment may be capital. Jurors should approach the task of finding facts and exercising discretion as to choice of penalty with appreciation that their duties are serious and that they are accountable for their decisions, not with the feeling that they are making mere tentative determinations which the courts can correct. An argument improperly diminishes the jury's duty and responsibility if it implies that a reviewing court can substitute its judgment as to choice of punishment or that the decision of whether the sentence of death is appropriate is not entirely the jury's responsibility.[40]

In State v. Robinson,[41] also in 1982, the State Supreme Court vacated a death sentence and remanded for a new sentencing hearing because the prosecutor referred repeatedly to the jury's sentence as a "recommendation" that did not have a "strong possibility" of "get[ting] through all of that [appellate] review."[42] Citing *Berry* and *Willie*, the court anticipated the "no effect" test required by the eighth amendment, stating:

> The closing argument requires that the death sentence be set aside, because this court cannot determine that misleading and improper remarks of this magnitude did not influence the jury's recommendation. . . . [W]e cannot say that the jury's sentencing discretion was unaffected by the prosecutor's repeated and often misleading references to the largely irrelevant consideration of appellate review of death sentences.[43]

As the Louisiana Supreme Court observed, *Caldwell* neither imposed a new obligation on prosecutors or courts nor broke new ground in Louisiana.[44] Before the Supreme Court decided *Caldwell*, Louisiana had already prohibited *Caldwell* argument and required reversal of sentences when it found such error. Moreover, in finding that *Caldwell* argument injected an arbitrary factor into the sentencing process, the Louisiana courts relied on the same eighth amendment principles that compelled the Supreme Court's decision in *Caldwell*. In State v. Sonnier,[45] the Louisiana Supreme Court stated that under Louisiana law, the court "is charged with the responsibility of reviewing the jury's recommendation to determine whether the sentence was influenced by passion,

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[38] 410 So.2d 1019 (La. 1982), *cert. denied*, 465 U.S. 1051 (1984).

[39] *Id.* at 1034.

[40] *Id.* at 1035; *see* State v. Clark, 492 So.2d 862, 870-71 (La. 1986).

[41] 421 So.2d 229 (La. 1982).

[42] *Id.* at 231-33.

[43] *Id.* at 233-34 (portions of text omitted).

[44] *See* State ex rel. Busby v. Butler, 538 So.2d 164, 173 (La. 1988).

[45] 379 So.2d 1336 (La. 1979).

prejudice or any arbitrary factor."[46] The court described how Louisiana modelled its provision for independent appellate review of death sentences on the Georgia procedure sanctioned in Gregg v. Georgia, and cited approvingly the Georgia Supreme Court's reversal of a death sentence when it found that "an unobjected to argument by a [prosecutor] may have influenced the jury to impose a more severe sentence than unbiased judgment would have given."[47] In *Willie*, the court again adverted to *Gregg*'s requirement that a sentencer's discretion be channelled to avoid arbitrary and capricious imposition of the death penalty, and held that the prosecutor's improper argument regarding appellate review "lessened" the jurors' appreciation of their "awesome responsibility" and "created a reasonable possibility that the death sentence was imposed under the influence of passion, prejudice or arbitrary factors."[48] Echoing *McGautha*, the Louisiana Supreme Court thus anticipated almost exactly Justice O'Connor's conclusion in *Caldwell* that such arguments "creat[e] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' . . . or through 'whim . . . or mistake.' "[49]

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[46] *Id.* at 1371.

[47] *Id.* at 1370-71 & n.4.

[48] *Willie*, 410 So.2d at 1032, 1034.

[49] *Caldwell*, 472 U.S. at 343, 105 S.Ct. at 2647 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3451, and *Eddings*, 455 U.S. at 118, 102 S.Ct. at 879).

The majority concedes that numerous states, including Louisiana, forecast *Caldwell* by prohibiting the arguments that the *Caldwell* Court ultimately barred, but concludes that because states' *Caldwell* precursors did not impose an independent constitutional constraint on state power, they are irrelevant to *Teague*'s analysis. That the state courts adopted these rules before *Caldwell* to conform state law to perceived eighth amendment requirements, rather than conforming to an independent federal constitutional constraint articulated by the Supreme Court, is a distinction without a difference for the purpose of determining whether *Caldwell* announced a "new rule." In either case, the state courts based their interpretations on the eighth amendment, and their widespread anticipation of *Caldwell* strongly suggests that the Supreme Court's subsequent decision in that case maintained a continuity with and fulfilled clearly discernible principles in eighth amendment jurisprudence.

In Dugger v. Adams,[50] the Supreme Court found these state laws sufficiently established to conclude that the legal basis for raising a *Caldwell*-type claim prior to *Caldwell* was "reasonably available to counsel," and that *Caldwell* was, therefore, of such vintage as to be subject to the procedural-bar rule.[51] In Moore v. Blackburn,[52] we considered a writ application based on *Caldwell* barred by the abuse-of-writ doctrine for the same reason. If both the Supreme Court and this court have considered, on the

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[50] ___ U.S. ___, 109 S.Ct. 1211 (1989).

[51] *Id.* at ___, 109 S.Ct. at 1215-17.

[52] 774 F.2d 97 (5th Cir. 1985), *cert. denied*, 476 U.S. 1176 (1986).

basis of state laws anticipating *Caldwell*, a *Caldwell*-type claim sufficiently established to negate cause for failing to raise it years before *Caldwell*, how may we now ignore these state laws and conclude that *Caldwell* is novel?

Contrary to the majority's assertion, the *Teague* plurality's citation of *Ford v. Wainwright*[53] as an example of a "new rule" does not establish that state rules are irrelevant to determining whether a rule is "new."[54] In *Ford*, the Court looked to state law for "objective evidence of contemporary values"[55] and noted that 26 states had enacted statutes prohibiting the execution of insane persons while other states adhered to the common law principle prohibiting such executions.[56] Although the *Teague* plurality did not explain *why Ford* should be considered a "new rule," the Court's discussion in *Penry* suggests that any substantive eighth amendment rule that "prohibits imposing the death penalty on a certain class of defendants because of their status or because of the nature of their offense" will be "new" because of its sweeping and categorical nature,[57] even though such a rule may be premised on a finding that contemporary values, manifested through legislative enactments, already condemn

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[53] 477 U.S. 399, 106 S.Ct. 2595 (1986).

[54] *See Teague*, ___ U.S. at ___, 109 S.Ct. at 1070.

[55] *Ford*, 477 U.S. at 406, 106 S.Ct. at 2600.

[56] *Id.* at 408-09 & n.2, 106 S.Ct. at 2601 & n.2.

[57] *Penry*, 57 U.S.L.W. at 4965 (citations omitted). Such a rule would, however, necessarily fall within the first exception to *Teague* and would be applied retroactively. *See ibid.*

such punishment.[58] The fact that a rule is inherently ground-breaking insofar as it announces a new, categorical rule of substantive eighth amendment law thus appears to outweigh the fact that the rule derives from these indicia of community consensus.

The *Teague* plurality's citation of *Ford* cannot, therefore, be construed as a broad holding regarding the proper role of state law in determining whether a rule is "new." At most, *Teague*'s citation of *Ford* indicates that the existence of state common law and statutes embodying principles later incorporated into eighth amendment law does not preclude a finding that the rule is nevertheless "new." It does not command us to ignore state law and, in particular, it does not indicate that state court interpretations of the federal Constitution are irrelevant to determining whether a rule is "new" under *Teague*.

Indeed, the majority's refusal to address the import of a state's interpretation of the federal Constitution misconstrues the basis of *Teague*'s retroactivity principles. The plurality opinion in *Teague* anchored its retroactivity analysis, the majority recognizes, in the principles of federalism and finality; it sought to mitigate the uncertain effect of new and unanticipated obligations on final state court judgments.[59] The majority ignores, however, a

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[58] *Ibid.*; *see Stanford v. Kentucky*, ___ U.S. ___, ___ S.Ct. ___, 57 U.S.L.W. 4973, 4976 (1989); *Thompson v. Oklahoma*, 487 U.S. ___, 108 S.Ct. 2687, 2691 (1988); *Enmund v. Florida*, 458 U.S. 782, 788-96, 102 S.Ct. 3368, 3371-76 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-97, 97 S.Ct. 2861, 2866-68 (1977).

[59] *Teague*, ___ U.S. at ___, 109 S.Ct. at 1070-75 (O'Connor J., plurality opinion).

basic precept of federalism that animated the *Teague* plurality: state courts, no less than federal courts, may meaningfully interpret the federal Constitution. "It is intolerable," Justice Harlan asserted, "that [the Supreme Court] take to [itself] the sole ability to speak to . . . issues of federal constitutional law;" the decision of an "inferior" court, "cognizant of the Federal Constitution and duty bound to apply it," should not be deemed "forever erroneous because years later th[e Supreme] Court took a different view of the relevant constitutional command."[60] The majority's failure to acknowledge and give effect to Louisiana's prohibition of *Caldwell*-type error prior to *Caldwell* minimizes the role of state courts in our federal constitutional framework and devalues the importance of the dialogue by which state and federal courts articulate evolving federal constitutional norms.[61]

Sawyer did not raise his *Caldwell* claim on direct review, and, on collateral review, the Louisiana courts summarily rejected the argument on its merits. Although our conclusion on the merits of Sawyer's claim differs from that reached by the Louisiana courts on collateral review, we rely on the same constitutional principles that the state courts considered, not on some "new" constitutional rule unanticipated by the Louisiana Supreme Court. An advocate of even the narrowest view of the appropriate role of collateral review could not maintain

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[60] Mackey v. United States, 401 U.S. 667, 680, 689-90, 91 S.Ct. 1160, 1174, 1178 (1971) (Harlan, J., concurring in the judgment).

[61] *See* Cover and Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035 (1977).

that principles of federalism and finality preclude habeas relief whenever a federal court, applying the same constitutional principles as the state court, reaches a different conclusion on the merits of a petitioner's claim. This minimal "backstop" function of collateral review to which the majority refers remained untouched by *Teague*.

We are aware that the Court's decision in *Penry* implies that the "new rule" analysis is properly focused on one state when the proposed rule is directed at the procedure of a particular state, but may be broader when the proposed rule would apply to all states.[62] We, therefore, do not suggest that Louisiana's anticipation of *Caldwell* is dispositive[63] of whether *Caldwell* was a new rule, for *Caldwell* error is not restricted to Louisiana's sentencing procedure. At a minimum, however, the adoption of *Caldwell*-type rules by numerous states, including Louisiana, prior to *Caldwell* reveals the degree to which the Court's eighth amendment jurisprudence compelled the result reached in *Caldwell*.

III.

Even if *Caldwell* announced a new rule, it nevertheless should be applied to cases on collateral review because it falls within the exception provided by *Teague* for new rules requiring the observance of "those procedures that . . . 'are implicit in the concept of ordered liberty,' " that "implicate the fundamental fairness of the

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[62] *See Penry*, 57 U.S.L.W. at 4961-62, 4965.

[63] *See Teague*, 109 S.Ct. at 1070 (citing Ford, 477 U.S. at 410).

trial," and "without which the likelihood of an accurate conviction is seriously diminished."[64]

The plurality in *Teague* diverged from Justice Harlan's approach to retroactivity by adding an "accuracy" qualification to the "fundamental fairness" exception, implying that only those rules touching on factual innocence would fall within it.[65] While Justice Harlan had subscribed to this view in his dissent in *Desist*,[66] he subsequently rejected it in *Mackey*, acknowledging that "it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged."[67] The majority admits that the *Teague* plurality's modification of Justice Harlan's second exception does not command a majority of the Court, and although a solid majority of the Court employed *Teague*'s retroactivity analysis in *Penry*, *Penry* did not address the *Teague* plurality's gloss of the fundamental fairness exception.[68]

The Court's unanimous recognition in *Penry* that *Teague's* first exception encompasses a distinct eighth

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[64] *Teague*, ___ U.S. at ___, 109 S.Ct. at 1075-77 (O'Connor, J., plurality opinion) (quoting *Mackey*, 401 U.S. at 693, 91 S.Ct. at 1180 (Harlan, J., concurring in the judgment) (quoting Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152 (1937))).

[65] *See Teague*, ___ U.S. at ___, 109 S.Ct. at 1080 (Stevens, J., concurring in part and concurring in the judgment).

[66] *See Desist*, 394 U.S. at 262, 89 S.Ct. at 1041 (Harlan, J., dissenting).

[67] *Mackey*, 401 U.S. at 694, 91 S.Ct. at 1181 (Harlan, J., concurring in the judgment).

[68] *See Penry*, 57 U.S.L.W. at 4961, 4965.

amendment component[69] suggests that the Court would find a parallel component in *Teague's* second exception, and exempt from *Teague's* nonretroactivity rule those capital sentencing procedures that ensure the "accuracy" of the sentencer's determination. The plurality in *Teague* acknowledged that "'a' criminal judgment necessarily includes the sentence imposed."[70] Both the plurality and dissent in *Teague* would, therefore, agree that *Teague's* exemption of new rules that ensure the accuracy of the determination of the defendant's guilt or innocence includes new rules that ensure the accuracy of the sentencer's determination that a particular defendant deserves the death penalty.[71]

The rule *Caldwell* announced, based on the "heightened 'need for reliability' " in capital sentencing,[72] satisfies *Teague's* second exception: *Caldwell* error undermines the eighth amendment's requirement that responsible jurors produce individualized, reliable verdicts, and thus seriously diminishes the likelihood of an accurate sentence. As Justice O'Connor emphasized in her concurrence in *Caldwell*: "[T]he prosecutor's misleading emphasis on appellate review misinformed the jury, . . .

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[69] *Ibid.*

[70] *Teague*, ___ U.S. at ___ n. 3, 109 S.Ct. at 1077 n. 3 (O'Connor, J., plurality opinion).

[71] *See ibid; id.* at ___ n. 5, 109 S.Ct. at 1089 n. 5 (Brennan, J., dissenting); *cf. Adams*, ___ U.S. at ___, 109 S.Ct. at 1217-18 n. 6; *id.* at ___ n. 4, 109 S.Ct. at 1219 n. 4 (Blackmun, J., dissenting); *Ramos*, 463 U.S. at 1007-09, 103 S.Ct. at 3457.

[72] *Caldwell*, 472 U.S. at 340, 105 S.Ct. at 2645 (quoting *Woodson*, 428 U.S. at 305, 96 S.Ct. at 2991 (Stewart, J., plurality opinion)).

creating an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily and capriciously' . . . or through 'whim or mistake.' "[73] For the majority to ignore the effect of *Caldwell* error on the reliability and accuracy of the sentence seriously misapprehends the nature of a *Caldwell* violation and the reasons behind the Court's decision to prohibit it.

To justify its conclusion that *Caldwell* does not satisfy *Teague's* second exception, the majority relies primarily on Dugger v. Adams,[74] in which the Court held that refusing to consider a petitioner's procedurally-barred *Caldwell* claim would not result in a "fundamental miscarriage of justice."[75] Acknowledging that *Adams* scrutinized "the facts of a particular case, while the *Teague*[-]ordered liberty standard looks to the character of the general rule asserted," the majority nonetheless dismisses this distinction as more semantic than substantive.

Whether or not the principles underlying the procedural default and retroactivity doctrines are similar, there is a substantial difference between denying *a particular petitioner* the benefit of a rule based on the unique facts of his case, and holding that *no petitioner*, whatever his situation, may benefit from retroactive application of the rule to his case. The Court recognized this distinction in *Adams*, stating that "[d]emonstrating that an error is by

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[73] *Caldwell*, 472 U.S. at 343, 109 S.Ct. at 2647 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3451 and *Eddings*, 455 U.S. at 118, 102 S.Ct. at 879).

[74] ___ U.S. ___, 109 S.Ct. 1211 (1989).

[75] *Id.* at ___ n. 6, 109 S.Ct. at 1217-18 n.6.

its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent, of the sentence he or she received."[76] Under *Teague*, we must address the nature of *Caldwell* error, not the specific facts of Sawyer's case.

The majority conflates the individual and the categorical in order to obscure the ultimate import of its holding – that the eighth amendment values *Caldwell* articulated constitute an unwarranted innovation in eighth amendment jurisprudence and are insignificant in the pantheon of values present in criminal procedure. *Caldwell* is worthy of higher esteem, for the Supreme Court found *Caldwell* error so destructive of the fundamental right of a defendant assured by the eighth amendment to a reliable and accurate sentence that it presumed the error to be prejudicial unless the state demonstrated otherwise.[77] Not all errors in the capital sentencing context are so critical. For example, a death sentence based on an aggravating factor invalid under state law, but supported by evidence properly before the sentencer, does not sufficiently implicate the accuracy of the sentencing process to warrant a presumption of prejudice.[78] Prejudice is assumed, however, when the sentencer has not been allowed to consider or give effect to relevant

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[76] *Ibid.*

[77] *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

[78] *See* Barclay v. Florida, 463 U.S. 939, 956-57, 103 S.Ct. 3418, 3428 (1983); Zant v. Stephens, 462 U.S. 862, 887-88, 103 S.Ct. 2733, 2748 (1983).

mitigating evidence,[79] when an aggravating factor is premised on incorrect or invalid evidence,[80] or when the jury's sense of responsibility has been undermined.[81]

IV.

The majority acknowledges that the death penalty "is different from all other [punishments] in many respects." Yet, by denying that *Caldwell* interpreted and applied consistently the Court's eighth amendment jurisprudence to new facts, and by refusing to accord the heightened need for reliability in capital sentencing a role in *Teague's* fundamental fairness exception, the majority eviscerates the procedural protections on which the constitutionality of this ultimate and irreversible penalty is premised. The majority has, in effect, given finality concerns greatest force in the area where the eighth amendment requires that we be most wary. We cannot agree that a state's interest in the finality of a judgment of death outweighs a defendant's right that a sentencing jury, accurately informed of its role and responsibility, determine his moral culpability. Society takes little delight in the grim, but sometimes necessary, execution of a criminal defendant; its investment is in the informed, deliberative process by which the state's taking of a life is made legitimate.

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[79] *See* Hitchcock v. Dugger, __ U.S. __, __, 107 S.Ct. 1821, 1824 (1987); Skipper v. South Carolina, 476 U.S. __, __, 106 S.Ct. 1669, 1673 (1986).

[80] *See* Johnson v. Mississippi, 486 U.S. __, __, 108 S.Ct. 1981, 1987 (1988).

[81] *See* Caldwell, 472 U.S. at 341, 105 S.Ct. at 2646.

It is indeed ironic that the majority invokes *Teague*, undoubtedly a new rule,[82] to prevent us from applying *Caldwell*, which is at most an extension of settled doctrine. If any case should be considered as having established a new rule not retroactively applicable to habeas petitioners whose convictions have become final, it is *Teague* itself. Had the majority decided Sawyer's case on the basis of the Supreme Court decisions in existence when Sawyer's case was argued and submitted to this court, the majority opinion would have granted him a new sentencing hearing. The majority instead reaches out to an opinion rendered by the Supreme Court 16 months after submission of Sawyer's case and 8 ½ years after Sawyer's trial to find a reason to deny him constitutional protection. That to us is a finality of sorts, a final and irretrievable absurdity.

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[82] *See Teague*, __ U.S. at __ nn. 3 & 4, 109 S.Ct. at 1086 nn. 3 & 4 (Brennan, J., dissenting); *compare id.* at __, 109 S.Ct. at 1060-78 (O'Connor, J., plurality opinion) *with* Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731 (1965); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967); *Desist*, 394 U.S. 244, 89 S.Ct. 1030 (1969); *Mackey*, 401 U.S. 667, 91 S.Ct. 1160

Robert Wayne SAWYER

v.

John WHITLEY, Warden, Louisiana State Penitentiary, Angola, Louisiana.

Civ. A. No. 90-4035.

United States District Court, E.D. Louisiana.

July 16, 1991.

Louisiana prisoner filed a second petition for a writ of habeas corpus after he was convicted of first-degree murder and sentenced to death, the Louisiana Supreme Court, 422 So.2d 95, affirmed, the United States Supreme Court, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407, granted certiorari and vacated and remanded, and the Louisiana Supreme Court, 442 So.2d 1136, again affirmed. The District Court, Mentz, J., held that: (1) the prisoner failed to show that the ends of justice would be served by reaching the merits of successive claims that had been raised in the prisoner's first habeas petition; (2) some claims that had been omitted from the earlier petition were barred under the abuse of the writ doctrine; (3) the prisoner's claim that design defects in Louisiana's electric chair would result in cruel and unusual punishment was not an abuse of the writ, because the claim was based on evidence that had not been available at the time of the first habeas petition; and (4) electrocutions in Louisiana's electric chair do not result in cruel and unusual punishment, although the design of the chair could have been improved.

Petition for writ of habeas corpus denied.

Nicholas J. Trenticosta, New Orleans, La., for petitioner.

Dorothy A. Pendergast, Asst. Dist. Atty., Research & Appeals, Gretna, La., Annette Viator, Chief Legal Counsel, Dept. of Corrections, Baton Rouge, La., for respondent.

MEMORANDUM OPINION

MENTZ, District Judge.

This death penalty case is before the Court for review of Robert Sawyer's second petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In the interest that the validity of his conviction be finally resolved, the Court permitted Sawyer to amend this second petition three times. The State filed responses to the petition and each amendment. After careful review of the briefs and evidence submitted by the parties, the record, and the applicable law, the Court denies Sawyer's petition for writ of habeas corpus.

I.

Robert Sawyer is a state prisoner incarcerated at the Louisiana State Penitentiary for the murder of Frances Arwood. Although the gruesome details of the murder of [sic] have been recounted several times[1], the Court does so again for a proper understanding of the ruling herein.

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[1] *See Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822, 2825, 111 L.Ed.2d 193 (1990); *Sawyer v. Butler*, 848 F.2d 582, 585 (5th Cir.1988); *Sawyer v. State*, 442 So.2d 1136, 1136-37 (La.1983); *State v. Sawyer*, 422 So.2d 95, 97-98 (La.1982).

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant [Robert Sawyer] was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the

attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or ever revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant)

would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

Then, displaying callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("they've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw the defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died.

State v. Sawyer, 422 So.2d at 97-97 (Footnotes omitted).

II.

Sawyer was convicted of first degree murder and sentenced to death on September 19, 1980.[2] He has pursued post-conviction remedies for more than a decade. At all stages, he was represented by counsel.

The Louisiana Supreme Court affirmed his conviction and sentence on direct appeal. *State v. Sawyer*, 422 So.2d 95 (La. 1982). The United States Supreme Court vacated and remanded the case to the Louisiana Supreme Court for consideration of an issue unrelated to the present petition.[3] *Sawyer v. Louisiana*, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). On remand, the court again affirmed the conviction and sentence. *State v. Sawyer*, 442 So.2d 1136 (La.1983). Thereafter, Sawyer filed a state application for habeas corpus relief. After an evidentiary hearing, the state trial court denied relief. Next, Sawyer sought a writ of habeas of corpus in the Louisiana Supreme Court, which summarily denied his application. *Sawyer v. Maggio*, 479 So.2d 360 (La.1985).

Sawyer filed his first petition for federal habeas corpus relief in this court on January 20, 1986. Sawyer's petition raised 18 claims for relief, all of which the Court addressed on the merits and denied. On appeal, the Fifth

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[2] Sawyer and Lane were tried separately. Lane also was convicted of first degree murder, but he received a life sentence without benefit of parole, probation, or suspension of sentence. *See State v. Lane*, 414 So.2d 1223 (La.1982) (affirming Lane's conviction).

[3] The United States Supreme Court remanded for consideration of whether the invalidity of an aggravating circumstance in sentencing impaired the death sentence.

Circuit affirmed the denial. *Sawyer v. Butler,* 848 F.2d 582 (5th Cir.1988).[4] On rehearing *en banc,* the Fifth Circuit affirmed the panel's opinion. *Sawyer v. Butler,* 881 F.2d 1273 (5th Cir. 1989). On June 21, 1990, the United States Supreme Court affirmed the judgment of the Fifth Circuit. *Sawyer v. Smith,* ___ U.S. ___, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990).[5]

Sawyer filed his second state petition for habeas corpus relief on October 3, 1990. On October 5, 1990, the trial court summarily denied Sawyer's application as repetitive and without merit. The Louisiana Supreme Court denied Sawyer's supervisory writ without opinion on October 7th, 1990. On October 8, 1990, Sawyer filed his

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[4] On appeal, Sawyer raised only three challenges to his confinement and sentence: 1) whether he was denied effective assistance of counsel; 2) whether he was denied due process because the trial court failed to comply with a state law requiring that counsel assigned in a capital case must have been admitted to the bar at least five years; and 3) whether prosecutorial misconduct erroneously misled the jury as to their role in the death penalty determination. In addition, Sawyer challenged the district court's application of a prejudice requirement on the claim of prosecutorial misconduct.

[5] The Supreme Court considered only the question of whether a prisoner whose murder conviction became final before the decision in *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), which prohibits the imposition of death sentence where the prosecutor's closing arguments diminished the jury's sense of responsibility for imposing a capital sentence, is entitled to use that decision to challenge his capital sentence in a federal habeas corpus action. The Court ruled that he cannot not [sic], because *Caldwell* announced a new rule and did not come within the exception for rules necessary for fundamental fairness of the criminal proceeding.

second petition for federal habeas corpus relief in this Court.[6] In this second petition, the present petition before the Court, Sawyer raises six grounds for relief, described in his petition as follows:

> 1) Mr. Sawyer was denied due process and a meaningful and individualized sentencing determination because of trial counsel's unreasonable failure to investigate and present compelling and readily available mitigating evidence and to obtain defense mental health experts in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
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> * * *
>
> 2) Mr. Sawyer was incompetent to proceed to trial, and while the issue of competency was raised, it was not adequately resolved because the sanity commission members rendered an incompetent evaluation in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.
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> * * *

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[6] At that time, Sawyer's execution was scheduled for October 10, 1990. On October 9, 1990, the Governor of Louisiana, Governor Roemer, granted a reprieve and stay of execution for thirty days so that the Pardon Board could fully review the case. On November 13, 1990, Judge Joseph Tiemann, District Judge of the Twenty-Fourth Judicial District Court issued a warrant for Sawyer's execution to be carried out on December 14, 1990. On December 12, 1990, this Court stayed the execution to conduct an evidentiary hearing on Sawyer's claim that Louisiana's electric chair is defectively designed.

3) Mr. Sawyer will remain conscious during his execution by electrocution and will be unnecessarily tortured; his execution will not comport with this society's evolving standards of decency and will violate the Eight and Fourteenth Amendments to the United States Constitution.

* * *

4) Louisiana's electric chair is riddled with design defects which cause excessive burning, mutilation, and pose a future risk of even greater torture in violation of the Eighth and Fourteenth Amendments to the United States Constitution and article 1, section 20 of the Louisiana Constitution.[7]

* * *

5) The Eighth Amendment to the United States Constitution forbids the State from carrying out the imposition of the death penalty to Mr. Sawyer [sic] by electrocution.

* * *

6) The State hid exculpatory evidence, failed to reveal that its star witness had been promised immunity in exchange for her testimony, and knowingly offered false testimony at trial in violation of Mr. Sawyer's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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[7] Federal habeas corpus relief can be granted only for violations of the Constitution or laws of the United States. *See Wills v. Egeler*, 532 F.2d 1058 (6th Cir.1976). For that reason, the alleged violation of Louisiana's constitution is not discussed herein.

III.

As this is Sawyer's second federal habeas petition, the Court must first consider whether his claims are barred pursuant to Rule 9(b) of the Rules Governing Section 2254 Cases. Rule 9(b) provides:

> (b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

28 U.S.C. § 2254 Rule 9(b) (West 1991).

A. Successive Claims

A claim in a second federal habeas corpus action may be barred as a successive claim "only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Sanders v. United States*, 373 U.S. 1, 15, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 (1963). Once it is shown that the claims raised in the new petition were determined against the petitioner on the merits on the prior petition, the petitioner has the burden to show that "the ends of justice would be served by a redetermination of the ground." *Id.* 373 U.S. at 16, 83 S.Ct. at 1078. In *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), the

Supreme Court undertook to provide the lower courts with a definition of "the ends of justice". The Court held that "the 'ends of justice' require federal courts to entertain [a successive] petition only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Id.* 477 U.S. at 454, 106 S.Ct. at 2627.

In the case at bar, three of the six grounds for relief contained in Sawyer's present petition, Claims 1, 3, and 5, were determined against him on the merits on his first petition. Thus, Sawyer has the burden to show that the ends of justice would be served by reaching the merits of these successive claims.

Claim 1: Ineffective Assistance of Counsel Due to Failure to Present Mitigating Evidence at the Sentencing Phase

Sawyer alleges in Claim 1 that he was denied a proper sentencing determination because his trial counsel failed to obtain mental health experts and present at the sentencing phase evidence in mitigation of the death penalty. Sawyer does not dispute that he specifically raised this same ground for relief in his first federal habeas petition, Claim III, Fact 8, and that it was rejected on its merits. The only difference is that now Sawyer has come forward with additional evidence to support this claim.

The evidence in support of Claim 1 shows Sawyer's organic brain damage, moderate mental retardation, and various other mental disorders, as well as his history of childhood abuse, neglect, and tragedy. In addition, there is evidence that Sawyer was hospitalized in four mental health facilities, that he received shock therapy, and that

in 1967, he was adjudicated incompetent by the State of Tennessee.

Sawyer's trial counsel submitted similar evidence at the sentencing phase. The jury heard extensive testimony from Sawyer's sister and brother-in-law about Sawyer's mother's suicide, his mental instability, his abusive and neglectful father, and his commitment to a mental hospital and shock therapy.

Sawyer contends that if the additional evidence now offered had been introduced at the sentencing phase, it would have reduced his moral culpability, and the jury would have rejected the death penalty for a life sentence. Sawyer does not allege that any of this additional evidence demonstrates his factual innocence. For this reason, he cannot carry his burden of proof to show that the ends of justice would be served by reaching the merits of this issue again. Therefore, Claim 1 of Sawyer's petition is barred under Rule 9(b) as a successive claim.

Claims 3 and 5: Execution by Electrocution

Claim 3 alleges that Sawyer will remain conscious during the electrocution and will be unnecessarily tortured. Claim 5 alleges that execution by electrocution is cruel and unusual punishment. Sawyer previously raised these same grounds for relief in his first federal habeas petition, at Claim XV:

> Electrocution involves physical torture and is an excessively cruel and unnecessary method of extinguishing human life. Electrocution requires massive doses of electricity to the condemned person for several minute [sic] before death. The condemned person does not become

> unconscious until after the person has endured a period of agonizing pain. Electrocution disfigures and physically distorts the condemned person.

As these grounds were determined to be without merit on Sawyer's first petition,[8] Sawyer must make a colorable showing of factual innocence to avoid the bar.

In support of Claims 3 and 5, Sawyer submitted an affidavit from Dr. Harold Hillman, Director of the Unity Laboratory in Applied Neurology at the University of Surrey, England, who opines that electrocution is intensely painful. Sawyer also cites various cases and macabre newspaper accounts of electrocution, as well as professional treatises on the subject of electrocution. In addition, Sawyer submitted a post-execution photograph of Robert Wayne Williams. The 1983 photograph shows burns on Williams' head and leg. This evidence relates only to Sawyer's death penalty, and has no bearing on his factual guilt or innocence. Therefore, the Court finds that the ends of justice would not be served by a redetermination of this issue, and Claims 3 and 5 are barred under Rule 9(b) as successive claims.

B. Abuse of the Writ

When a claim is raised for the first time in a second federal habeas petition, the Court must examine the

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[8] The district court ruled that the grounds for relief raised on Claim XV were conclusory in nature, and that Sawyer offered no fact or law to justify their consideration. This was a determination on the merits, which Sawyer did not appeal.

claims for abuse of the writ. *Sanders*, 373 U.S. at 17, 83 S.Ct. at 1078. Under the abuse of writ doctrine, the new claims may be dismissed on the ground that the petitioner failed to raise the claims in his earlier petition through inexcusable neglect. *See Moore v. Butler*, 819 F.2d 517, 519 (5th Cir.), *cert. denied*, 482 U.S. 920, 107 S.Ct. 3201, 96 L.Ed.2d 688 (1987) (quoting *Jones v. Estelle*, 722 F.2d 159, 163 (5th Cir.1983) (en banc), *cert. denied*, 466 U.S. 976, 104 S.Ct. 2356, 80 L.Ed.2d 829 (1984)). The Supreme Court recently clarified that the standard for abuse of the writ through inexcusable neglect is "cause and prejudice". *See McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991). Once the state pleads with clarity and particularity that the petitioner has abused the writ through inexcusable neglect, the burden then shifts to the petitioner to show a cause which excuses his failure to include the new claim in his first petition and actual prejudice resulting from the omission. *Id.*

Cause requires a showing that the failure to file the claim in the first petition was due to some objective factor such as interference by officials which made filing the claim impracticable, reasonable unavailability of the factual or legal basis for the claim, and constitutionally ineffective assistance of counsel. *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986)). The court must examine "whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process." *McCleskey*, ___ U.S. at ___, 111 S.Ct. at 1472. Prejudice requires a showing of actual prejudice amounting to a denial of fundamental fairness. *Murray*, 477 U.S. at 494,

106 S.Ct. at 2648. Because the petitioner must show both cause and prejudice, a court need not consider whether there is actual prejudice to the petitioner when he has failed to show cause. *McCleskey*, ___ U.S. at ___, 111 S.Ct. at 1474 (citing *Murray*, 477 U.S. at 494, 106 S.Ct. at 2649.) However, even where the petitioner is unable to show cause, he may still avoid the bar to his new claim if he shows that a "fundamental miscarriage of justice would result from a failure to entertain the claim." *McCleskey*, ___ U.S. at ___, 111 S.Ct. at 1470. This exception to the cause requirement exists where the "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496, 106 S.Ct. at 2649.

In the case at bar, the State has sufficiently pled abuse of the writ. Sawyer's prior writ history reveals that the present petition raises three new claims: 1) Claim 2 alleges that Sawyer was incompetent to proceed to trial and that this fact would have been discovered but for the inadequate psychiatric evaluation rendered by the sanity commission; 2) Claim 4 alleges that Louisiana's electric chair is defectively designed so that it causes unnecessary mutilation and torture, and that these defects are such that even greater harm may be caused during future execution; and 3) Claim 6 alleges that th State withheld exculpatory evidence. Thus, Sawyer must show a legitimate cause for failing to file these claims in his first federal habeas petition.

Claim 2: Competency to Proceed to Trial

Sawyer makes absolutely no showing as to why this claim was not included in his first petition. There is no

dispute that the question of Sawyer's competency was raised prior to his trial. He had sufficient basis to raise the competency issue on his first habeas proceeding. In addition, Sawyer has not offered any evidence of innocence to satisfy the fundamental miscarriage of justice exception to the cause requirement. Accordingly, Claim 2 is barred under Rule 9(b) as an abuse of the writ.

Claim 4: Louisiana's Electric Chair is Defectively Designed

Sawyer argues that State has concealed since Wayne Williams' execution in 1983, that its electric chair has design defects which cause mutilation and torture. While there is no evidence to show concealment, it is a fact that Louisiana does not maintain any maintenance or repair records on the electric chair, reports about the executions, or documentation on the post-execution condition of the prisoner's body.

In support of Claim 4, Sawyer submitted significant evidence that was not in existence at the time of his first habeas proceeding. This evidence is affidavits from people who witnessed executions in Louisiana after the time Sawyer filed his first federal habeas petition. These eyewitness affidavits are crucial to his claim given Louisiana's lack of official documentation on the electric chair and executions. It cannot seriously be disputed that Sawyer will suffer actual prejudice if Louisiana's electric chair does not meet constitutional standards. As Sawyer has demonstrated both cause and prejudice, the Court finds that Claim 4 is not an abuse of the writ. The merits of this claim are discussed in section IV below.

Claim 6: Failure to Reveal Exculpatory Evidence

Sawyer contends that the State hid exculpatory evidence. Specifically, Sawyer contends that despite a pretrial request for "any exculpatory evidence favorable to the defendant," the State concealed that: 1) its key witness, Cynthia Shano, was promised immunity in exchange for her testimony; 2) Wayne Shano, the four-year-old son of Cynthia Shano, told a police detective that Sawyer did not set Arwood on fire and tried to stop Lane from doing so; 3) Cynthia Shano knew Charles Lane prior to the commission of the crime; and 4) Cynthia Shano lied when she testified at trial that she does not drink.

The evidence supporting Sawyer's allegation that Shano was promised immunity is seven affidavits from people who know her stating that she either told them or told someone else who repeated to them that she made a deal with the State to testify against Sawyer in order to save herself. Likewise, an affidavit is the supporting evidence for Sawyer's allegation that Wayne Shano exculpated Sawyer. Diane Thibodeaux, a close friend of Cynthia Shano, states in her affidavit that she was present when the police detective interviewed Wayne Shano, and that Wayne said "daddy tried to help the lady"[9] and that the "other man" had lit Arwood on fire. The evidence supporting Sawyer's claim that Cynthia Shano knew Charles Lane prior to the murder is a 1981 letter from William Rausch to Shano. At that time Rausch was a prisoner at the Jefferson Area Community Correction Center. In his letter he states that he spoke with Charles

[9] Wayne Shano called Robert Sawyer "Daddy", but Sawyer was not Wayne's father.

Lane in prison and Lane indicated that he was a good friend of Shano's. Finally, the evidence supporting the claim that Shano lied on the stand about her drinking consists of the prosecutor's handwritten notes for his direct examination of Detective Geiling which indicate that the investigating detective smelled the odor of alcohol on Shano's breath.

Sawyer offers no explanation for failing to produce this evidence on his first federal habeas petition. The legal and factual support for this claim was reasonably available at the time of Sawyer's first petition. There is no reason why the affidavits in support of this claim could not have been obtained earlier. With respect to the evidence that Lane knew Shano before the murder, the letter from Rausch to Shano was available from the District Attorney, who gave open file discovery to Sawyer's first habeas counsel. Likewise, the notes regarding the odor of alcohol on Cynthia Shano's breath could have been found in the District Attorney's files.

Sawyer does not allege that his first habeas counsel was constitutionally ineffective for failing to investigate and obtain this evidence. The Court nevertheless addresses the issue here in the interest of avoiding any further delays. In order to demonstrate ineffective assistance of counsel, a petitioner must show that his counsel's performance is constitutionally ineffective under the standard established in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984): (1) that his attorney's performance fell below an objective standard of "reasonably effective assistance"; and 2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have been different." Even if Sawyer's first habeas counsel erred in failing to obtain this evidence[10], Sawyer cannot show that he was prejudiced.

It is unlikely that any of this evidence would have supported habeas relief in the first proceeding because of the unlikelihood that the evidence would have changed the outcome of the trial. *See U.S. v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (to obtain relief for a failure to reveal exculpatory evidence it must be shown that the suppressed evidence would have an effect on the outcome of the trial.) There is substantial evidence that the State did *not* offer Shano a deal for immunity, *see* affidavits of Cynthia Shano and former District Attorney, Phillip Boudesque, and that Wayne Shano *implicated* his father when he was questioned by the police detective, *see* police report of Detective Paul E. Livaudais. In addition, the letter from Rausch to Shano is dated January 27, 1981, subsequent to Sawyer's September, 1980 trial and conviction. Thus, the State did not have any knowledge of the letter at the time of Sawyer's trial. With respect to the odor of alcohol on Shano's breath, there was other evidence of Shano's drinking that could have been used to impeach her, *see* Police Report, and, in any event, it is highly unlikely that such evidence would have effected the outcome of the trial given the overwhelming evidence of Sawyer's guilt.

Thus, Sawyer has not shown cause for failing to present this claim in his prior petition. Sawyer also has

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[10] The Court makes no finding that Sawyer's first habeas counsel rendered less than "reasonably effective assistance."

failed to show that a fundamental miscarriage of justice will result if the Court does not rule on the merits of Claim 6. The evidence of Sawyer's guilt is so overwhelming that even considering the allegedly exculpatory evidence, it cannot be said that the alleged failure to reveal that evidence resulted in the conviction of an innocent man.

IV.

After reviewing the pleadings, the Court determined that an evidentiary hearing on Claim 4 was warranted due to the conflicting affidavits from the parties' experts.[11] At the conclusion of the hearing, the Court

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[11] One of the expert affidavits submitted by Sawyer in support of Claim 4 is the affidavit of Fred Leuchter. The Court recently read in the Times-Picayune newspaper that Leuchter was charged by the State of Massachusetts with practicing engineering without a license. *See* Times-Picayune, June 19, 1991, at A-11. The article reported that on June 11, 1991, Leuchter signed a consent agreement with the Massachusetts board that licenses engineers stating: "I am not and never have been registered as a professional engineer" and that he had nevertheless represented himself as an engineer in several dealings with various states that use the death penalty. The agreement also required Leuchter to stop disseminating the "Leuchter Report" in which he purports to be an engineer and offers the view that the gas chambers in Nazi concentration camps were never used for mass killings. *Id.*

Leuchter's affidavit in the case at bar states: "I have been involved in electrical engineering work for 26 years." Interestingly, although Sawyer relied to a great extent on Leuchter's affidavit in his petition for habeas corpus, he did not call Leuchter as a witness at the evidentiary hearing, nor did he offer his affidavit as evidence.

found that Louisiana's electric chair meets constitutional standards. The Court rendered oral reasons and advised the parties that written reasons would follow in this opinion. The Court's reasons are set forth below.

The issue presented in Claim IV is whether the electric chair used by the State of Louisiana is defectively designed in such a manner that execution in the chair will result in unnecessary pain and suffering in violation of the Eighth Amendment of the United States Constitution, which proscribes cruel and unusual punishment. Any argument that execution by electrocution is unconstitutional per se is foreclosed by legal precedent. *See e g, In re Kemmler,* 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463, 67 S.Ct. 374, 376, 91 L.Ed. 422 (1947).

Louisiana's electric chair uses head and leg electrodes to deliver current to the prisoner's body. The purpose of the head electrode is to deliver current directly to the brain to render the prisoner unconscious and block his ability to feel pain. The evidence is that electrocution in Louisiana's electric chair can cause some blistering and burning in the areas where the electrodes are strapped to the head and legs. There are two aspects of the design of the chair that are responsible for the burning: 1) the elongated shape of the head electrode accentuates the leading edge effect, which causes current density between the end of the head electrode and the ear[12]; and 2) some resistance is created by air in the

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[12] The leading edge effect is based on the principle that current tries to travel the shortest path. The theory as it applies

(Continued on following page)

natural cavities of the sponges placed between the electrode and the prisoner's skin. These conditions create electrical resistance and thereby result in some electricity being channelled away from the brain. There was also testimony that the placement of the leg electrodes near the knee and shin in a thin skin area could cause burning.

Sawyer's expert, Dr. John Webster, concluded that these conditions resulted in unnecessary burning and mutilation. The State's expert, Dr. Michael Morse, concluded that while a circular head electrode would be an improvement to the elongated shape, the difference is not significant because enough current still reaches the brain to render the prisoner unconscious. Morse further testified that despite the air in the sponge, the resistivity of the natural sponge is a proper level to carry out a humane execution. He also testified that it was advisable to wring out the sponge in order to prevent moisture from dripping onto the electrode straps. Both experts agreed that the leg straps should be very secure to prevent arcing.

The fact that the design of Louisiana's electric chair is subject to improvement, does not necessarily mean that an execution in the chair will not meet constitutional standards. To meet constitutional muster, an execution, as much as humanly possible, should minimize the risk of unnecessary pain, violence and mutilation. *See Glass v.*

(Continued from previous page)

in this case is that due to the elongated design of the electrode, the narrow end of the electrode, or the leading edge, is closer to the leg electrode than any other part of the head electrode resulting in a concentration of current under the leading edge.

Louisiana, 471 U.S. 1080, 1086, 105 S.Ct. 2159, 2163, 85 L.Ed.2d 514 (1985). "The State is not required to employ the most modern state of the art technology in implementing the death penalty or to foresee and meet every problem which conceivably could ever arise during an execution." *Buenoano v. Dugger*, 1990 WL 119637 (M.D.Fla. June 22, 1990) (citing *Glass*, 471 U.S. at 1086, 105 S.Ct. at 2163).

The Court accepts the testimony of the State's expert that electrocution in the manner performed by the State of Louisiana provides sufficient current to the brain to result in instantaneous disruption of the brain's ability to operate, immediately rendering the condemned unconscious and unable to feel pain. Although there may be some injury to the body, there is no perception of pain. For this reason, Louisiana's electric chair does not cause wanton or unnecessary infliction of pain. Accordingly, the Court finds that the design of Louisiana's electric chair does not violate the mandates of the Eighth Amendment. *See Ritter v. Smith*, 568 F.Supp. 1499, 1526-27 (S.D.Ala.1983), *aff'd in part and rev'd in part on other grounds*, 726 F.2d 1505 (11th Cir.), *cert. denied*, 469 U.S. 869, 105 S.Ct. 218, 83 L.Ed.2d 148 (1984) (a properly performed electrocution "involves an instantaneous blocking of any sensory perceptions or instantaneously rendering the person unconscious so that he was unable to feel any pain. . . . ")

While Claim IV raises only the issue of defective design, testimony was introduced relating to the operation and maintenance of the electric chair, as well as the

procedures for carrying out an execution. On these matters, the evidence is that Louisiana's operation, maintenance, and procedures are appropriate to carrying out constitutional executions by electrocution. The evidence established no constitutional violation.

V.

In conclusion, all of the claims raised in this petition, except Claim 4, are barred under Rule 9(b). Sawyer is not entitled to habeas corpus relief on Claim 4 because he has failed to establish a constitutional violation.

Accordingly,

IT IS ORDERED that the petition for Writ of Habeas Corpus is DENIED.

IT IS FURTHER ORDERED that judgment shall be entered against the petitioner, Robert Sawyer, and in favor of the respondent, John Whitley, Warden, Louisiana State Penitentiary, Angola, Louisiana DISMISSING WITH PREJUDICE the Petition for Writ of Habeas Corpus. IT IS FURTHER ORDERED that the stay of execution entered on December 12, 1990 is VACATED[13].

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[13] The Louisiana Legislature recently amended and reenacted Louisiana Revised Statute § 15:569(A) and (B) to make lethal injection the manner of execution for every sentence of death executed after September 15, 1991. 1991 La.Act 159 (July 2, 1991). The amended statute reads as follows:

§ 569. Place for execution of death sentence; manner of execution

(Continued on following page)

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A. Every sentence of death executed in this state prior to September 15, 1991, shall be by electrocution, that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room.

B. Every sentence of death executed on or after September 15, 1991, shall be by lethal injection: that is, by the intravenous injection of a substance of substances in a lethal quantity into the body of a person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room.

Having found that Louisiana's electric chair meets constitutional standards, there is no reason to maintain the stay of Sawyer's execution until September 15, 1991.